TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]23

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

[illegible]AM T. SILER, LAWRENCE B. FINN, AND LEW P. [illegible]ARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED FEBRUARY 15, 1911.

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(22,526.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

ADAM T. SILER, LAWRENCE B. FINN, AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States within and for the Eastern District of Kentucky, Sitting at Frankfort, in the Cause and Matter Hereinafter Stated, and the Same Being Disposed of at a Regular Term of said Court Begun and Held at the City of Frankfort, in said District, on the Fourth Monday in September, Being the 26th Day of said Month, A. D. 1910, to wit, on the 12th Day of January, A. D. 1911.

Present: Hon. John W. Warrington, circuit judge, specially designated to sit in this case, and Hon. Arthur C. Denison, district judge, and Hon. Edward T. Sanford, district judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky.

2 Said action was commenced on the 7th day of September, A. D., 1910, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

On the 7th day of September, A. D., 1910, bill of complaint was filed in said cause, which said bill is in words and figures as follows, viz:—

3 In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
versus
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky:

The Complainant, the Louisville and Nashville Railroad Company, brings this, its Bill of Complaint, against Adam T. Siler,

Lawrence B. Finn, and Lew P. Tarlton, who compose what is known as the Railroad Commission of Kentucky, and thereupon your Complainant says:

I.

That it is a corporation duly created, chartered, organized and existing under the laws of the State of Kentucky, having its principal office and place of business in the City of Louisville, County of Jefferson, State of Kentucky; that it is a citizen and resident of said State, and by virtue of its charter and the amendments thereto it has and had at the dates hereinafter mentioned power to sue and be sued, to contract and be contracted with, and to construct, own, lease, control, maintain and operate steam railroads in the State of Kentucky and in other States as a common carrier of intrastate and interstate freight and passengers; and that the amount in controversy in this cause exceeds the sum or value of Two Thousand Dollars, exclusive of interest or costs.

II.

That the defendants, Adam T. Siler, Lawrence B. Finn, and L. P. Tarlton, are, and each of them is, a citizen and resident of the State of Kentucky, and the said defendants are the duly
4 elected, qualified and acting members of and do constitute the Railroad Commission of the State of Kentucky, the principal office of which Commission is fixed by law at Frankfort, the seat of government of said State, which is in the Eastern District of Kentucky whereof the defendants as constituting said Commission are all inhabitants.

III.

Your complainant was incorporated and organized under an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to Charter the Louisville and Nashville Railroad Company," approved March 5, 1850, whereby complainant was authorized to construct and operate a railroad from Louisville, Kentucky, to the State Line in the direction of Nashville, Tennessee. Thereafter said charter was amended by an Act of said General Assembly, approved March 20, 1851, and by its said charter, thus amended, complainant was authorized to construct and operate a branch of its railroad to the Mississippi River and any other branches it might desire. Again, its charter was amended by Act of said General Asembly, approved January 17, 1856, and by its charter, as thus amended, complainant was authorized to purchase and hold any railroad constructed by any other railroad company. This said charter was amended by divers other Acts of said General Assembly, and by virtue of said charter, as thus amended, and upon the faith thereof, complainant has constructed branches and acquired and now owns, holds and operates, among others, the following railroads within the State of Kentucky, namely: The Cincinnati Division, from Louisville to Newport, 113.83 miles in length, also extends from Newport to Cincinnati, O.;

The Kentucky Central Division, from Sinks to Covington, 149.88 miles long, also extends from Covington to Cincinnati, Ohio;

The Richmond Branch, from a point near Richmond on the Kentucky Central Divison, to Rowland, a distance of 30.43 miles:

The Main Stem from Louisville to the Tennessee State Line, a distance of 139.88 miles;

5 The Bardstown and Springfield Branch, from Bardstown Junction on the Main Stem to Springfield, via Bardstown, a distance of 37.44 miles;

The Knoxville Branch, from Lebanon Junction, on the Main Stem, to the Tennessee State Line at Jellico, a distance of 171.17 miles:

The Lexington Branch, from La Grange, on the Cincinnati Division, to Lexington, a distance of 67.00 miles.

The destination- mentioned in this complaint and in the exhibit hereto attached are located on respective divisions of the Company, as follows:

On the Bardstown and Springfield Branch:
Bardstown,
Chapeze,
Clermont,
Deatsville,
Early Times,
Greenbrier,
Hobbs,
Samuels;

On the Knoxville Branch:
Chicago,
Coon Hollow,
Gethsemane,
Lebanon,
Loretto,
St. Mary's;

On the Richmond Branch:
Silver Creek;

On the Lexington Branch:
Eminence.

IV.

Complainant states that by section two hundred and nine (209) of the Constitution of the State of Kentucky, adopted September 28, 1891, the Railroad Commission of that State was established and provided for as follows:

"A commission is hereby established, to be known as 'The Railroad Commission' which shall be composed of three Commissioners. During the session of the General Assembly which convenes in December, eighteen hundred and ninety-one, and before the

6 first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each Superior Court District as now established, and said appointees shall take their

office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulared by law; and until otherwise provided by law the commission so created shall have the same
7 powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners? The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings as in the case of Judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor."

Complainant states that said Railroad Commission on or prior to September 28, 1891, the date the present Constitution of the State of Kentucky was adopted and went into effect, had not been empowered by any then existing constitutional or statutory provision to regulate or to fix the rate, toll or compensation, which a railroad company or corporation might charge, collect or receive for the service of transporting freight or passengers over its line or lines of railroad in that State, nor was there any attempt made by the General Assembly of the State of Kentucky afterward to confer such power upon said Commission until March 10, 1900, when said General Assembly attempted to grant such power to said Commission by enacting what is commonly called the "McChord Act," which, including its title, as follows:

"An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference therto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

8 "Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order and on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed
9 by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars;

"2. The Circuit Court of any County into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall

have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

Approved March 10, 1900."

By this act the said General Assembly undertook to authorize said Railroad Commission when complaint shall be made
10 to it, or when it receives information, or has reason to believe that any railroad company or corporation is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in the State of Kentucky, to perform judicial functions, that is to say, to hear and determine the matter as speedily as possible, having first given ten days' notice to the company or corporation complained of by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing, also the nature of the complaint or matter to be investigated; and the said General Assembly by the act aforesaid attempted to confer the judicial power upon said Commission to hear such statement, arguments or evidence offered by the parties as the Commission may deem relevant; and, should said Commission determine, in the exercise of the powers of a court sought to be thus granted to it, that the company or corporation is, or has been, guilty of extortion, the said General Assembly undertook to grant or delegate to said Commission legislative power, and to impose on it the duty to make and fix, without further notice or investigation, a just and reasonable rate, toll or compensation which such railroad company or corporation may charge, collect or receive for like services thereafter rendered. According to the provisions of said act the rate, toll or compensation so fixed by said Commission shall be entered and be an order on the record book of its office, and be in full force and effect at the expiration of ten days after said Commission shall have mailed a copy of the order fixing the same to any officer, agent or employé of the company or corporation affected thereby; and said act further provides that such order of said Commission may be at any time, without further notice, evidence or investigation, revoked or modified by an order of said Commission likewise entered of record.

It is further provided by said act that should such railroad company or corporation, of any officer, agent or employé thereof, charge,

collect or receive a greater or higher rate; toll or compensation for like services thereafter rendered than that made and fixed
11 by said Commission, as aforesaid, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense in any sum not less than five hundred ($500) dollars, nor more than one thousand ($1000) dollars, and, upon a second conviction, in any sum not less than one thousand (1000) dollars, nor more than two thousand ($2000) dollars, and for a third and succeeding convictions, in any sum not less than two thousand ($2000) dollars, nor more than five thousand ($5000) dollars.

The said act further provides that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

V.

By the provisions of Section 819, Kentucky Statutes, which is Section 226 of an act entitled, "An Act providing for the creation and regulation of private corporations," which became a law April 5, 1893, the offenses of extortion and unjust discrimination by a railroad company or corporation are required to be prosecuted by indictment or action in the name of the Commonwealth of Kentucky, upon information filed by the Railroad Commissions, and such indictments shall be made only upon the recommendation or request of the Railroad Commission filed in the court having jurisdiction of the offense. This section is in substance the same as section four (4) of the act of the General Assembly of the State of Kentucky, approved April 6, 1882, entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations and in aid of that purpose to establish a board of Railroad Commissioners and define its
12 powers and duties," set forth in the General Statutes of Kentucky, edition of 1888, page 1023. The said act of March 10, 1900, known as the McChord Act, does not appear to have been intended to change the settled legislative policy that indictments for such offenses should be found on the recommendation of the Railroad Commission, and the duty of enforcing any orders making and fixing a railroad rate under the provisions of the last mentioned act rests on the defendants constituting the said Railroad Commission.

VI.

The Constitution of the State of Kentucky, which is now and has been since September 28, 1891, in full force and effect, contains these provisions:

"SEC. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"SEC. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Said State Constitution also provides as follows:

"SEC. 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"SEC. 135. No courts, save those provided for in this Constitution, shall be established."

The said Railroad Commission is not a court established by said Constitution, nor is it by any provision thereof vested with any judicial or legislative powers or functions whatever concerning rates or otherwise, nor is the General Assembly thereby
13 authorized to legislate upon, regulate or fix such rates for the transportation of freight or passengers, or to grant or delegate any judicial or legislative powers to said Commission to regulate or fix railroad rates for the transportation of freight or passengers within the State of Kentucky. But, notwithstanding said provisions of the present Constitution of the State of Kentucky, the General Assembly, in violation thereof, by said McChord Act of March 10, 1900, attempted to grant and delegate to and combine in said Railroad Commission all three of the fundamental powers of said State government or of a government republican in form, viz: Those which are legislative; those which are executive; and those which are judicial; so that said Commission is an anomalous and unconstitutional body, which, with respect to all proceedings or investigations before it concerning the rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator and prosecutor. It may itself be the complainant, or may act as the complainant's attorney; as judge, it may try all preliminary questions and pass on the guilt or innocence of the carrier accused of extortion; as legislator, it may make and fix the compensation of the carrier found by it guilty of extortion for like services thereafter rendered; as informer, it may procure indictments by the Grand Jury for the disobedience of its legislative acts; and as prosecutor, it may recover in behalf of the State from the carrier thus indicted the penalties imposed by said act for such disobedience.

No appeal to any court or tribunal possessing judicial powers is allowed or provided for by said McChord Act, or any other statute of the State of Kentucky, in behalf of the railroad carrier, from any order of said Commission adjudging it guilty of extortion, or

from any order of said Commission making and fixing what it shall have determined to be a just and reasonable rate, toll or compensation, which such railroad carrier may charge, collect or receive for like services thereafter rendered, in lieu of the rate, toll
14 or compensation held by said Commission to be extortionate.

A judicial investigation or judicial review of the question of the reasonableness of the existing rate, toll or compensation being charged, collected or received by a railroad carrier, or of the accusation of extortion, is not allowed or provided for by said McChord Act or any statute of the State of Kentucky. The order or judgment of said Commission adjudging that an existing rate of any railroad carrier operating a line of road in the State of Kentucky for the transportation of intrastate freight or passengers is extortionate, or that such carrier is guilty of extortion, is final and conclusive, or intended so to be, by any fair or reasonable construction of said act; and in any prosecution by indictment in the Circuit Court, having criminal jurisdiction to recover the penalties imposed by said act for disregarding such order or judgment of said Commission, or for charging, collecting or receiving a higher or greater rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, neither the carrier, its officer, agent or employé, indicted for the alleged offense of extortion, is allowed by the terms of provisions of said McChord Act, or any statute of the State of Kentucky, to make or establish by evidence the defense that the existing rate charged, collected or received is just and reasonable, or that the rate made and fixed by said Commission is not just and reasonable.

Furthermore, were such a defense allowed, the issue raised thereby could not be, in the nature of the case, tried by a jury or a court of criminal jurisdiction. Besides, different juries or courts, were such a defense permitted, might reach different conclusions on the same or similar testimony as to whether the offense of extortion had been committed; and the criminality of the act of the carrier or its officer, agent or employé indicted would depend on the view of the jury or court of the reasonableness of the rate charged, collected or received, and the question of reasonableness would depend on many uncertain and complicated elements.

15 Complainant states that the rate, toll or compensation made and fixed by said Commission as, in its opinion, a just and reasonable one for certain services in the transportation of intrastate freight or passengers, to be thereafter followed or observed by the carrier, is by any fair or reasonable construction of said McChord Act, not simply advisory nor merely prima facie just and reasonable, but final and conclusive as to what is a just and reasonable rate, toll or compensation for the services of the carrier, as prescribed by said Commission, for like services thereafter rendered, and said act neither contemplates nor allows any issue to be made or inquiry to be had as to the justness or reasonableness in fact of any rate, toll or compensation made and fixed by said Commission, which, under the provisions of said act, is the only one that is lawful, and, in contemplation of law, the only one that is just

and reasonable, and in any proceeding under said act to enforce the final order or ruling of said Commission, in these respects, by the recovery of the fines and penalties imposed thereby or otherwise, there is no fact left to be traversed or reviewed by the court or jury, except the fact of the alleged violation of said act in not complying with such final order or ruling of said Commission.

Complainant states that said McChord Act is violative of the sections of the State Constitution of Kentucky hereinabove referred to, and is, therefore, void.

Complainant further states that said McChord Act is not only unconstitutional and void as violative of the Constitution of the State of Kentucky, but it constitutes as abandonment by said State of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and is, therefore, void.

16 The said act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitution of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said McChord Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest

17 court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Con-

stitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdicion, either State or Federal

VIII.

Complainant further states that in its effort to prevent any judicial inquiry as to the validity of said McChord Act the General Assembly of the State of Kentucky burdened with excessive, extreme and cumulative fines and penalties any challenge thereof in the courts so that the carrier or party affected thereby is necessarily constrained to submit to an unjust and unreasonably low rate made and fixed by said Commission for its services in transporting intrastate freight or passengers, rather than take the chances of the fines and penalties imposed for a refusal or failure to comply with said Commission's final order making and fixing such rate, and thus such carriers are deprived by the State of Kentucky, through the operation of said act, of the equal protection of the laws in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States

Furthermore, the provisions of said McChord Act which have been hereinabove referred to, in prescribing a fine of not less than Five Hundred Dollars nor more than One Thousand Dollars for the first offense of extortion, as therein defined, and a fine of not less than One Thousand Dollars nor more than Two Thousand Dollars for the second offense, and a fine of not less than Two Thousand Dollars nor more than Five Thousand Dollars for the third offense in each case against a railroad company or corporation of any officer, agent or employé thereof, charging, collecting or receiving a greater or higher rate, toll or compensation or like services that may be rendered after the order of the Commission thereon than that made and fixed by said Commission, do impose upon such railroad company or corporation and upon such officer, agent or employé thereof, the burden of obtaining a judicial decision of the question of the
18 reasonableness and justness of the rate or rates, toll or compensation so charged, collected or received, only upon the condition that if unsuccessful such railroad company or corporation or such officer, agent, or employé thereof must pay fines as provided in said McChord Act, as hereinabove set forth, and thus the provisions of said McChord Act do close up all approaches to the courts and do thus prevent any hearing upon the question whether the rate or rates, charges or compensation, as provided in said Act and as made and fixed by said Commission, are not too low and, therefore, invalid, and complainant says that said fines and penalties imposed and made cumulative by said McChord Act are excessive within the meaning and intent and in violation of Section 17 of the State Constitution of Kentucky and they are unconstitutional on their face without regard to the question of the justness or reasonableness of the rates that may be made or fixed by said Commission, and are, therefore, in violation of the provisions of Article XIV of the Amendments to the Constitution of the United States, and said McChord Act is therefore unconstitutional and void.

IX.

Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a
19 judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said act, required to make and fix what it may think is a just and reasonable rate, toll, or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said act, and thus such railroad carrier is deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant states that said McChord Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, and is not restricted to rates actually charged, collected or received within said State for the transportation of traffic, having its origin and destination in said State, and by its terms and provisions said act is an express and direct interference with and regulation of interstate commerce, and in conflict with sub-section three (3), section eight (8), of article one (1) of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce
20 among the several States, which power the Congress has exercised by An Act to regulate commerce" approved February

4, 1887, and the amendments thereto, and said McChord Act is, therefore, unconstitutional and void.

XL.

Complainant further states that heretofore, to wit, on the 30th day of May, 1910, the Greenbrier Distillery Company and numerous other corporations acting in concert with said Distillery Company, each of which claimed and purported to be a corporation duly incorporated and empowered under the laws of the State of Kentucky to engage in the distillery business, that is to say, in the manufacture, storage, preparation for market, and sale of whiskey and other distillery products, and in shipping same to and from their respective plants filed their joint petition as plaintiffs with the Railroad Commission of Kentucky against this complainant, and therein said Greenbrier Distillery Company and its co-plaintiffs alleged that their respective plants were located upon the lines and at certain named stations of defendant in said complaint, the Louisville and Nashville Railroad Company, complainant herein, which are in a previous paragraph hereof specially set forth, and that, in order to carry on and to operate their respective distilleries, it was, in said petition, alleged to be necessary for each of said plaintiffs to cause to be transported over defendant's lines from various points in Kentucky set forth in Exhibit A filed with said petition to their respective plants various commodities alleged to be necessarily used by said plaintiffs in the manufacture and preparation of whiskey and other distillery products for the markets.

In said petition, said plaintiffs did set forth in Exhibit A made part thereof the rates therein complained of and the commodities upon which the same were then assessed, as well what purported to be former rates as the points of origin and of destination, and plaintiff did further therein allege that, for many years prior to the 25th day of March, 1910, defendant had transported over its line or lines of railroad to and from points wholly within the State of
21 Kentucky the various commodities shown in said Exhibit and that it had charged, collected, and received from the plaintiffs during said time the rates printed therein from said points of origin to their said respective plants, and it was further therein alleged that on the 15th day of March, 1910, defendant issued its circular 2910 cancelling each and all of said printed rates shown in said Exhibit, and that in lieu thereof to be effective March 25th, 1910, defendant had substituted the designated new rates, which were shown by figures inserted in said Exhibit in red ink, and that for the transportation of all said commodities to and from the points shown in said Exhibit, this defendant had ever since the 25th day of March, 1910, charged, collected, and received from the plaintiffs the said increased rates as aforesaid, and still charges, collects, and receives from the plaintiffs the said increased rates as aforesaid.

It was further alleged by said plaintiffs, in said petition, that each and all of said increased rates so charged, collected, and received, from said points of origin to the respective plants of each of the

plaintiffs, as shown in said Exhibit so far as the same are therein shown to be in excess of said former rates, were extortionate, unjust, and unreasonable, and it was alleged that defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in additions to their several plants upon the faith, as it was in said petition alleged, of said former rates, and that the defendant had maintained said rates for many years as just and reasonable rates.

And it was further alleged in said petition that all said rates charged, collected, and received by Complainant prior to March 25, 1910, were fairly remunerative, and that they were and are no
22 more than just and reasonable compensation for the transportation of said commodities to and from said points.

Plaintiffs did thereupon pray that the Railroad Commission of Kentucky would, after due notice and investigation, make and fix just and reasonable rates to and from all the points and upon all the commodities, as shown in their said Exhibit A, and that the said rates should be fixed no higher than those charged, collected, and received by defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates, which was effective March 25, 1910, and they prayed further for all necessary orders in the premises.

It was also in said petition set forth by said plaintiffs, in the second paragraph thereof, that inasmuch as defendant had continuously since the 25th day of March, 1910, charged, collected, and received from plaintiffs and was continuing so to charge, collect, and receive from them the increased rates shown in their said Exhibit A aforementioned, said defendant was, as said plaintiffs alleged, to the extent of the difference between said former rates and the existing rates then in effect, as set out in said first paragraph and in said Exhibit A, charging, collecting, and receiving from plaintiffs and each of them extortionate, unjust, and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits thereafter to be filed by plaintiffs, but which, in fact, were never filed,—which Exhibits, it was therein stated, would show the amount of such alleged extortionate charges and collections made from each of the plaintiffs to the dates therein respectively stated, and plaintiffs did allege that the plaintiff, Greenbrier Distillery Company, was entitled to recover the sum of Five Hundred and Thirty-two and 62-100 Dollars, ($532.62); the plaintiff T. W. Samuels Distillery Company, the sum of One Hundred and Twenty-three and 48-100 Dollars, ($123.48); the plaintiff Early Times Distillery Company, the sum of Four Hundred
23 and Eight and 51-100 Dollars, ($408.51); the plaintiff Mueller, Wathen & Kobert, the sum of Four Hundred Dollars and 77-100, ($400.77); the plaintiff Tom Moore Distillery Company, the sum of Forty-four and 51-100 Dollars, ($44.51); the plaintiff W. B. Samuels & Company, the sum of Forty-eight and 81-100 Dollars, (48.81); the plaintiff M. C. Beam & Company, the sum of Fifty-seven and 42-100 Dollars, ($57.42); the plaintiff Old

Gran Dad Distilling Company, the sum of Two Hundred and Thirty-one and 58-100 Dollars, ($231.58); plaintiff Head and Parker, the sum of Forty-four and 80-100 Dollars, ($44.80); the plaintiff Wright & Taylor, the sum of Two Hundred and Fifty-seven and 50-100 Dollars, ($257.50); the plaintiff Clear Springs Distilling Company, the sum of Four Hundred and Eighty-one and 89-100 Dollars, ($481.89); the plaintiff S. Grabfelder & Company, the sum of Three Hundred and Twenty-five and 78-100 Dollars, ($325.78); the plaintiff Taylor & Williams, the sum of Two Hundred and Thirty-seven and 19-100 Dollars, ($237.19); the plaintiff Willow Springs Distilling Company, the sum of Three Hundred and Twenty-one and 62-100 Dollars, (321.62); and plaintiff Blair, Osborne & Ballard Distillery Company, the sum of Forty-two and 96-100 Dollars ($42.96).

And plaintiffs thus prayed that reparation be awarded to each of them for the amounts stated to be severally due, and that an award be made to each of them by the Commission for said respective sums, and plaintiffs did pray for all other and necessary orders and proceedings to which they might be entitled in the premises.

And complainant, being defendant in said proceeding, did move to strike from the petition of plaintiffs all matters relating to reparation, on the ground that the Railroad Commission of Kentucky had no authority to grant same.

Thereafter, Complainant, without waiving any question of law or procedure, filed its Answer in said proceeding traversing every affirmative allegation and material averment of said petition, and prayed that the same should be dismissed.

24 Afterwards, the defendants set the matter for hearing and on the 24th day of June, A. D. 1910, plaintiffs in said proceeding introduced a number of witnesses, and defendant, (being this Complainant), introduced a number of witnesses, but although the witnesses introduced by the plaintiffs, Greenbrier Distillery Company, and others, did testify to the rates on grain and distillery supplies on the lines of railroad of Complainant to points of destination thereon, to-wit, the distilleries of plaintiffs, respectively, and did further testify to the rates charged, collected, and received by Complainant for the transportation of said commodities to such points of destination both prior to March 25, 1910, and subsequent to said date, and, furthermore, though some of said witnesses did testify that they did, at the time of making considerable betterments and improvements on or about their respective distillery plants at such several points of destination, all within the State of Kentucky, suppose that the rates of this Complainant for the transportation of such commodities from the City of Louisville, Kentucky, to such points of destination within the State of Kentucky, would continue in force and effect, there was no testimony by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that became effective on the lines of railroad of Complainant on March 25, 1910, and that have been charged, collected, and received by it for such service of transportation on the

commodities named on and subsequent to said date, and no evidence was adduced in said proceedings that established or that tended to establish the unjust or unreasonable nature of said rates or of any of them or that said rates or any of them were or are extortionate; and no evidence was adduced that showed or tended to show that defendant, Louisville and Nashville Railroad Company, had induced any of the plaintiffs to expend large or any sums of money in the erection of or in additions to their several plants upon the faith of said former rates or of any of them.

25 But the evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D., 1910, this Complainant did have in effect upon its lines of railroad from the points of origin aforesaid to said points of destination rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points and with a purpose to encourage the manufacture of whiskey at said points on the lines of railroad of Complainant, and it was shown by the evidence at said hearing, and it is a fact, that said rates, (all of which were contained in the tariffs of Complainant), did not apply to shipments of said supplies from the same points of origin to the same points of destination when said supplies were intended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs and were, in fact, charged, collected, and received as aforesaid for like supplies when intended for distillery use. And a comparative statement of the rates applicable when the supplies were not to be used at distilleries is written in red ink upon the tabular statement, of which all else is in black ink, filed as part hereof marked Exhibit D.

That at all such times, said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rates based upon the intended uses of the supplies was abolished, but the rates made effective March 25, 1910, as aforesaid, were and are reasonable and just.

Nevertheless, the defendants, the Railroad Commission of Kentucky, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, did, on August 10, 1910, pass an order to the effect that the rates then charged, collected, and received by defendant, (being Complainant herein), for the transportation of the commodities to and

26 from the points thereinafter, (and herein below), named were extortionate, unjust and unreasonable, and that by charging said rates said defendant, (being Complainant herein), was and had been guilty of extortion, and said defendant Louisville and Nashville Railroad Company, (being Complainant herein), was then and there by said written Order forbidden to charge, collect, or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

Explanation of Abbreviations.

C. L.—Car Load. L. C. L.—Less Car Load. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

Rates in Cents Per Hundred Pounds Unless Otherwise Specified.

To—	From	Bbl.–box material, K. D.; min. wt., 30,000 lbs.		Bbls., empty; minimum, 120 bbls., per bbl.	Bots. caps, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Botts., comm., packed or released; min. wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington (prop.), Ky. Newport (prop.)	11	23	14	43	23	29	25	31½	28	10	..
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Chapeze,	Louisville, Ky.	5	13	9	20	13	15	10	15	13	5	8
Chicago,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Clermont,	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	..
Coon Hollow,	Covington, Ky. Newport, Ky.	12	20½	14	37½	20½	33	23½	28½	21½	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Deatsville,	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Early Times,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Gethsemane,	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12½
Greenbrier,	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	..
Hobbs,	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	..
Lebanon,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Loretto,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
St. Mary's	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Samuels,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Silver Creek,	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	..
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	..
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	..
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

27 And said Railroad Commission did thereupon declare that the foregoing rates so by it fixed for the transportation of said commodities from and to said points were just and reasonable.

And Complainant states that, without having heard any evidence whatsoever relative to the amount of money claimed by any of the plaintiffs in this proceeding as a refund on account of payment by them respectively to Complainant between March 25, 1910, and August 10, 1910, for the transportation of said commodities or some of them, between the points of origin and the points of destination, all within the State of Kentucky, the Railroad Commission did nevertheless on said 10th day of August, 1910, pass another written Order whereby and wherein it again expressed the opinion and did order that the rates that were then charged, collected, and received by defendant, (being Complainant herein), for the transportation of said commodities to and from the points fully set out in the written Order of said Commission aforementioned, were and are extortionate, unjust, and unreasonable, and it did order that this defendant, by charging said extortionate rates, was and had been guilty of extortion, and the Commission did then find it to be a fact, without any evidence whatsoever having been presented before it in support thereof, that the Complainants, who are hereinbelow named, had paid to defendant, (being Complainant herein), the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points respectively, and that each of said Complainants hereinafter named was by said order awarded sums respectively set opposite their names, to wit:

Greenbrier Distillery Co.	$532.62
Clear Springs Distilling Co.	481.89
Early Times Distilling Co.	408.51
Mueller, Wathen & Kobert	400.77
S. Grahfelder & Co.	325.78
28 Willow Springs Distilling Co.	321.62
Wright & Taylor	321.62
Taylor & Williams	237.19
Eminence Distillery Co.	248.37
Old Gran Dad Distillery Co.	231.38
T. W. Samuels Distillery	123.42
Warwick Distilling Co.	127.74
Burks Spring Distillery Co.	145.25
W. B. Samuels & Co.	58.81
M. C. Beam & Co.	57.42
Head & Parker	44.80
Blair, Osborne & Ballard Distilling Co.	42.86
Tom Moore Distillery	44.51
Brown-Forman Company	
Bernheim Distilling Co.	
Mattingly & Moore Distillery Co.	
F. G. Walker Co.	
Charles Kobert & Co.	
Smith Distillery Co.	
R. Cummins & Co.	

And the Commission did furthermore order that each of said named complainants was entitled to recover of defendant, (being Complainant herein), the sum hereinabove respectively set opposite its name, and it was further ordered by the Commission that upon failure of defendant, (being Complainant herein), to pay to each of said complainants the sum set opposite its name respectively as hereinabove set forth, a certified copy of its said Order, finding and award, together with the evidence heard, should be filed by A. T. Siler, Chairman of said Commission, defendant herein, in the Office of the Clerk of the Circuit Court of the County having jurisdiction as provided by law, to the end that the said complainants may recover of said defendant their said respective sums.

There was no evidence introduced in said investigation or considered by said Commission showing or tending to show that
29 this Complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky or between the points of origin and of destination aforementioned were in and of themselves unjust, unreasonable, or extortionate, nor was there any evidence introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding or any of them were entitled to receive as reparation from this Complainant on account of previous payment by them or any of them of alleged unjust or unreasonable or extortionate rates.

Complainant says that the aforementioned two written opinions and orders passed by the Commission as above stated on August 10, 1910, were ordered by said Commission to be recorded upon the record books of said Commission and a certified copy of each of them was ordered to be furnished to defendant, Complainant herein. And the several rates made and fixed by the Commission as hereinabove set forth were entered as and were to be an order on the record book in the Office of said Commission and signed by the Commission, and a copy thereof was mailed by said Commission to W. G. Dearing, who is General Attorney of Complainant, and was received by said Dearing at Louisville, Kentucky, on August 31st., 1910. The original copy of said written opinion and orders mailed Complainant's General Attorney as aforesaid is filed herewith as part hereof marked Exhibit No. B. Complainant also files as part hereof, copy of petition and exhibits filed by plaintiffs Greenbrier Distillery Company, and others, and copy of Answer of defendant Louisville and Nashville Railroad Company,—all filed in said proceeding before the Commission, and marked Exhibit No. C.

Complainant further shows that said written orders of the Commission, dated August 10, 1910, which purport to make and fix rates that may be charged, collected, and received by Complainant for the transportation of the commodities therein named between the points of origin and destination,—all within the State of Kentucky,—that
are in said written Order set forth, are null and void, for the
30 additional reason that said Orders do, by their terms, purport to make and to fix rates that may be charged, collected,

and received by Complainant for the transportation of the commodities named between the points mentioned, without reference to the uses or purposes to which such commodities were to be applied by the consignees at the points of destination, and that such written Orders do, by their terms, make and fix flat rates applicable to the commodities named wholly without regard to the uses or purposes to which such commodities were to be applied by the consignees thereof, whereas, in fact and in law, the only subject-matter that was brought before the Commission for investigation by the Greenbrier Distilling Company and others in the proceeding aforementioned was the making and fixing of rates for the transportation of the commodities named in said petition to be used by the consignees, being plaintiffs in said proceeding, in their several distilleries at or near the respective points of destination in the production of whiskey and for no other use or purpose whatsoever. This Complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said Orders thereon were and are null and void.

31 XII.

Complainant states that the reduction in its said rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce Complainant's existing rates on said commodities shipped to and from stations on its lines in Kentucky to and from stations on its lines outside of Kentucky, as the full amount of Complainant's said existing local rates in Kentucky enter into and form a part of its through rates set forth in its tariff filed with the Interstate Commission on or about March 25, 1910, and remaining on file with that Commission ever since as required by law, on such interstate shipments of freight belonging to the same classes. The said Order made by the Commission, were it to become effective, would not only reduce Complainant's said local rates in Kentucky and cause an annual loss to Complainant on intrastate freight of at least $15,600, but would directly and necessarily result in reducing Complainant's through rates on interstate shipments of such freight, and cause an annual loss to Complainant thereon of not less than $3000. Thus the total reduction in the revenues of Complainant directly resulting from the Order afore-

said, should the same be put into effect, would not be less than $18,600 per annum. Complainant states that the change in rates and charges directed by the Commission in its Order aforesaid, would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on Complainant's lines, and to put into effect said Orders would be, to that extent, a direct regulation of interstate commerce and in violation of Clause Three (3), Section Eight, (8), Article One, (1) of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the Act to amend the "Act to Regulate Commerce", approved June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, wherein the power to fix and regulate rates to be charged, collected, or received by railroad
32 carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Acts of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power of authority to regulate or fix rates to be charged, collected, or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers on interstate freight or traffic, or to impose any orders, rules, charges, or regulations, the necessary result of the enforcement of which would be to affect and regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the Act aforesaid. Complainant states that the Orders of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, and the Act to Amend the Act to Regulate Commerce, approved June 18, 1910, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which Complainant relies on and invokes in the premises.

XIII.

Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intrastate freight business, affecting the commodities named in said order between the points of origin and points of destination herein mentioned, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passengers, to charge and receive for the services rendered by it in the State of Kentucky just and reasonable rates, which right to charge and receive such just and reasonable rates is a prop-
33 erty right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant states that the Commission's orders if permitted to be put in force, will deprive it of its said property right without due

process of law in violation of section one (1) of the Fourteenth Amendment to the Constitution of the United States.

XIV.

Complainant further states that in the transportation of the commodities herein above set forth between the points of origin and the points of destination named, all being within the State of Kentucky, the Complainant would, if the aforementioned Orders of the Commission should be put into force and effect, be restricted to charging, collecting, and receiving no higher rates for such services than those which the Commission has prescribed in its said Orders and although the same are unreasonably low, and unjust, the Complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates.

And in the great number of prosecutions by indictment that may, and will, be found and prosecuted against complainant, its officers, agents, and employees, to recover the excessive fines and penalties imposed by the McChord Act, the schedule of rates made and fixed by the Commission must and will be taken by the Courts having criminal jurisdiction of the public offenses to be final and conclusive that the rates prescribed therein are just and reasonable, and that any higher rates charged or collected by complainant are unjust, unreasonable and extortionate, and therefore in violation of law or of the provisions of the McChord Act.

Complainant states that the question as to what is a just, reasonable, and non-confiscatory rate to be charged or collected for the transportation of freight or other traffic is an exceedingly difficult and complicated one, for the consideration of which a jury is wholly unsuited, and it is a question which requires for its determination an inquiry into numerous and technical facts to
34 prove the existence of which necessitates the introduction of many witnesses, including the railroad officials, agents, and employees, who are engaged with duties of great importance to the public, the proper discharge of which requires the most constant attention of such officials, agents, and employés, in the offices where their books, records, and papers are kept.

Complainant states that if in the operation of its lines within the State of Kentucky, upon which said points of origin and of destination are located, Complainant fails or refuses to accept or to put into force and effect the schedule of reduced rates as prescribed in the Orders of the Commission aforesaid, defendants will cause to be instituted a great number of prosecutions by indictment against Complainant, its officers, agents, and employés, through the Grand Jury and Commonwealth's Attorney of each of the several Counties into or through which the line or lines of road carrying the freight are owned or operated by complainant, as well as in the County of Franklin, to recover the excessive fines and penalties imposed by the McChord Act for violations thereof, and Complainant will be subjected to great expense in loss of time of its officers, agents, and employés in giving the necessary attention for the defense of such prosecutions.

XV.

Complainant further says that the defendants had no authority or power under the laws of the State of Kentucky to award reparation to the Greenbrier Distillery Company in the sum of Five Hundred and Thirty-two and sixty-two one-hundredths Dollars, ($532.62), or in any other sum, for alleged excess of freight paid over and above what the Commission has fixed as a just and reasonable rate for the service rendered, or to award to any of the other plaintiffs in the proceeding before said Commission hereinabove described the sum of money awarded to it by said Order of August 10, 1910. Nevertheless, as hereinabove shown, upon the failure of this Complainant to pay to each of said corporations, plaintiffs in said proceeding, the sum hereinabove and in said Order set opposite their re-
35 spective names, the defendant, Adam T. Siler, as Chairman of said Commission, will, pursuant to its said Order, file a certified copy of said Order, Finding, and Award in the Office of the Clerk of the Circuit Court of the County into or through which the line or lines of road carrying the freight for the transportation of which said award was made, extend, said roads being owned or operated by this Complainant, and said copy of Order, Finding and Award will be so filed by said defendant to the end that the plaintiff or plaintiffs in said proceeding, to whom such awards have been made by the Railroad Commission of Kentucky, may recover of this Complainant their respective sums, and Complainant states that a separate action will thus be brought against this Complainant by each of the said plaintiffs in the said proceeding for the recovery of their respective sums.

XVI.

And Complainant states that in the multiplicity of such legal proceedings, which it seeks to avoid, the same questions would be involved without any opportunity for Complainant or its officers, agents, or employés, as the case may be, to make a defense or to show by evidence the reasonableness or justness of its said existing rates or the unreasonableness and unjustness of the rates aforesaid fixed by said Commission and the merits of any defense justifying a failure or refusal to obey said Order or Orders of the Commission cannot be tried in a court of law or in a court of criminal jurisdiction or be fully and finally settled otherwise than in a court of equity, and Complainant has no adequate remedy at law.

Complainant states that the defendants are threatening to carry out their said orders reducing the rates aforementioned by recommending and procuring numerous indictments against Complainant, its officers, agents, and employés on and after September 9, 1910, to recover the fines and penalties prescribed by the McChord Act, and the defendant Adam T. Siler, as Chairman of said Commission, threatens to file a copy of said Order of reparation, finding, and award in the Office of the Clerk of the Circuit Court of each of the Counties above mentioned, to the end that the plaintiffs in
36 said proceeding before the Commission may recover of this Complainant the respective sums set opposite their names in

said Order and Award, and the defendants will carry out their several purposes unless immediately restrained and enjoined by this Court from doing so.

Complainant states that it is not bound by, nor does it intend to obey, the several Orders of the Commission, either fixing the rates aforesaid or awarding reparation, and it does not intend to put into force and effect the rates so made and fixed by the Commission, and that it will neither put into force and effect said rates nor will it pay to each or any of the complainants or plaintiffs in said proceeding the sum set opposite their respective names in said Order of Reparation, unless denied relief from said respective Orders by the Court having final jurisdiction of this cause.

XVII.

Complainant further states that this is a suit in equity of a civil nature; that the matter in dispute far exceeds exclusive of interest and costs, the sum or value of Two Thousand Dollars, ($2000.00); that this cause is a suit arising under the Constitution of the United States, to wit, Section 4 of Article IV and Section 1 of Article XIV of the Amendment to said Constitution and other provisions thereof as hereinabove set forth.

In consideration whereof and for as much as Complainant is remediless in the premises at law or under the rules of the common law and can have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable, to the end that the defendant hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if same were again herein repeated and they were thereunto interrogated, Complainant prays that an injunction may issue out of this Court restraining and enjoining the defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky, from continuing said Orders of August 10, 1910, mailed to and received by Complainant's General Attorney on August 31, 1910, or at any time thereafter; also restraining and
37 enjoining said defendants and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky from recommending or causing to be instituted any prosecution by indictment or otherwise against Complainant or any of its officers, agents, or employés to recover any fine or penalty imposed by the McChord Act for or on account of Complainant's failure or refusal to put into force or effect on any of its lines of railroad in the State of Kentucky under protest or otherwise said Commission's Order promulgated August 31, 1910, or the rates fixed in the schedule prepared thereafter; also restraining and enjoining said defendant, Adam T. Siler, as Chairman of said Commission, from filing a certified copy of the Order, Finding and Award of Reparation, together with the evidence heard, in the Office of the Clerk of the Circuit Court of any of the Counties having jurisdiction or into or through which the line or lines of road owned or operated by this Complainant carrying the freight, concerning which said Award

was made, or in the Office of the Clerk of the Circuit Court of any other County within the State of Kentucky;

And that in the meantime and until a decision can be had upon Complainant's Motion for the Injunction herein prayed for, a Restraining Order be granted immediately restraining the acts sought herein to be enjoined, Complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until said Motion for an Injunction be heard and determined; that a writ of injunction be issued commanding and enjoining plaintiffs, as above prayed for, and on final hearing that said injunction, as herein prayed for, be made perpetual; that said two Orders of August 10, 1910, promulgated August 31, 1910, and the schedule of rates made and fixed by the Commission and the Finding and Award of Reparation contained in the second of said Orders, be forewith declared null and void by decree of this Court, and that a mandatory injunction be issued commanding said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, constituting said Commission, to recall and revoke and abolish said Orders and Award, and each of them, and that the said McChord Act under which defendants claim power and authority to make said orders, be declared and adjudged by decree of this Court to be in violation of the Constitution of the
38 United States and of the Constitution of the State of Kentucky, and therefore invalid, null, and void; and that Complainant may have such other relief as in equity it may appear to be entitled to.

And your Complainant prays that there be granted unto it the temporary Order aforesaid, the writ of injunction aforesaid, and a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court directed to said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarleton, individually and as Railroad Commissioners of the State of Kentucky, commanding them, under a penalty to be therein fixed, to appear on some certain day to be therein named, before this Honorable Court and then and there to answer but not under oath, (said oath being hereby expressly waived), all and singular the premises and to stand to and to perform and abide by such order, direction, and decrees as may be made against them in the premises, and as shall seem to Your Honors to be meet and agreeable to equity and good conscience, and your Complainant will ever pray.

This is the first and only application for a restraining order or injunction in this cause.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By ALBERT S. BRANDERS,
WILLIAM G. DEARING,
HENRY L. STONE,
Counsel.

STATE OF KENTUCKY,
Jefferson County:

Personally appeared before me, H. C. McLellen, a Notary Public, duly commissioned, qualified and acting in and for the County and State aforesaid, Addison R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville and Nashville Railroad Company, the Complainant in the foregoing Bill and knows the contents thereof; that the facts therein stated as of Complainant's own knowledge are true; and the facts therein
39 stated as upon Complainant's information and belief, he believes to be true.

ADDISON R. SMITH.

Subscribed and sworn to before me this 7th day of Sept. A. D., 1910.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 26th day of February, A. D., 1912.

[SEAL.] H. C. McLELLEN,
Notary Public, Jefferson County, Ky.

Filed Sept. 7, 1910, Chas. N. Wiard, Clerk.

Exhibit "A", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to wit:—

(Here follows table marked page 40.)

Explanation of *A*

C. L.—Carload. L. C. L.—Less than carload. K. D.—Kn

Net Rates in Cents Per Hundred L

To—	From—	Bbl. & box mt., K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty; C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.	
		Old.	New. [§]	Old.	New. [§]	Old.	New. [§]	Old.	New. [§]
Bardstown, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	11	*11	23	28	14	28	43	43
"	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Chapeze, Ky.	Louisville (proper) Ky.	5	5	13	13	9	13	20	20
Chicago, Ky.	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Clermont, Ky.	Louisville, Ky. (proper)	6	5	15	13	9	13	23	20
Coon Hollow, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	12	12	20.5	34	14	34	37.5	50
"	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Deatsville, Ky.	Louisville, (proper), Ky.	6	6	15	15	9	15	23	23
Early Times, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Gethsemane, Ky.	Louisville, (proper) Ky.	6	7	15	21	10	21	26	30
Greenbrier, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Hobbs, Ky.	Louisville, (proper) Ky.	6	5	15	13	9	13	23	20
Hunters, Ky.	Louisville (proper) Ky.	6	5	15	13	9	13	23	20
Lebanon, Ky.	Louisville (proper) Ky.	7	8	15	26	10	26	26	39
Loretto, Ky.	Louisville (proper) Ky.	7	7	15	23	10	23	26	34
St. Marys, Ky.	Louisville (proper) Ky.	7	8	15	24	10	24	26	35
Samuels, Ky.	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Silver Creek, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	10	10	19	19	12	19	35	35
"	Louisville (proper) Ky.	10	10	19	19	12	19	35	35

NOTE:

* New minimum 10,000 lbs. per 100 lbs.
† " " 24,000 "
‡ New boxes, wooden, empty, C. L. minimum 15,000 lbs.
[§ Column marked thus written in red ink in copy.]

EXHIBIT "A."

Explanation of Abbreviations.

L. C. L.—Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

Net Rates in Cents Per Hundred Lbs. Unless Otherwise Specified.

Bbl. & box mt., K. D. C. L., min. wt. 30,000 lbs.				Barrels, empty; C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.		Bottle covers, paper or straw, packed or pressed in bales. C. L., min. wt. 15,000 lbs.				Bottles, common, packed, released. C. L., min. wt. 24,000 pounds.				Boxes, empty, any qty.		Corn, Rye, malt, barley; C. L., min. wt. 24,000 lbs.		Iron, hoop. C. L., min. wt. 24,000 pounds.	
		L. C. L.								L. C. L.				L. C. L.							
Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.
	[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]
11	*11	23	28	14	28	43	43	23	†28	29	32	25	30	31.5	37	28	‡28	10	16	....	..
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
5	5	13	13	9	13	20	20	13	13	17	15	10	14	15	17	13	13	5	8	8	13
7	7	15	22	10	22	26	32	15	22	23	28	17	24	20	28	15	22	6	10	12.5	21
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
12	12	20.5	34	14	34	37.5	50	20.5	34	33	38	23.5	36	28.5	44	21.5	34	11	18	17	29
7	7	15	22	10	22	26	32	15	22	23	26	17	24	20	28	15	22	6	10	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	7	15	21	10	21	26	30	15	21	20	23	17	22	20	27	15	21	6	10	12.5	21
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
7	8	15	26	10	26	26	39	15	26	23	31	17	25	20	34	15	26	6	11	12.5	21
7	7	15	23	10	23	26	34	15	23	23	26	17	25	20	30	15	23	6	11	12.5	21
7	8	15	24	10	24	26	35	15	24	23	28	17	26	20	31	15	24	6	11	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	

imum 15,000 lbs.
nk in copy.]

41 Exhibit "B", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to wit:—

42 "EXHIBIT B."

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communicaion from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said Complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties and on said day and date pursuant to said agreement the Commission met at the Galt House in said city, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable, and by charging said rates defendant is, and has been, guilty of extortion.

It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is, hereby forbidden to
43 charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

Rates in Cents Per One Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; minimum wt., 30,000 lbs.		Bbls., empty; min., 120 bbls., per bbl.	Bottle caps, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 20,000 lbs.		Bots., com., packed or released; minimum wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Newport, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Chapeze	Louisville, Ky.	5	13	9	20	13	15	10	15	15	5	8
Chicago	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Clermont	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	....
Coon Hollow	Covington, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Newport, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Deatsville	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Early Times	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Gethsemane, Ky.	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12.5
Greenbrier	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	....
Hobbs	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	....
Lebanon	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Loretto	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
St. Marys	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Samuels	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Silver Creek	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	....
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	....
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	....
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

Explanation of Abbreviations.

C. L.—Carload. L. C. L.—Less Carload. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

44 The Commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable.

It is further ordered that this order be entered upon the records of this office, and a copy thereof attested by the Secretary of the Commission be furnished defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*
L. P. TARLTON, *Commissioner.*
L. B. FINN, *Commissioner.*

Attest:
D. B. CORNETT, *Secretary.*

45 Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House, in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties, and on said day and date, pursuant to said agreement, the Commission met at the Galt House in said City, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised, is of the opinion, and so orders, that the rates now charged, collected and received by defendant for the transportation of the commodities to and from the points fully set out in an order this day entered fixing just and reasonable rates in the above styled complaint, and as stated in said order are extortionate, unjust and unreasonable, and that by charging said extortionate rates said defendant is and has been guilty of extortion.

46 It further appearing to the Commission that the said rates upon said commodities have been charged, collected and re-

ceived by defendant since the 25th day of March, 1910, and it appearing that the complainants hereinafter named have paid to defendant the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points, this day fixed by the Commission as just and reasonable rates and as set out in said complaint, each of said complainants are awarded the following sums, to wit:

Greenbrier Distillery Company	$532.62
Clear Springs Distilling Company	481.89
Early Times Distillery Company	408.51
Mueller, Wathen & Kobert	400.77
S. Grabfelder & Company	325.78
Willow Springs Distilling Company	321.62
Wright & Taylor	257.50
Taylor & Williams	237.19
Eminence Distillery Co.	248.37
Old Gran Dad Distillery Company	231.38
T. W. Samuels Distillery	123.42
Warwick Distillery Company	127.74
Burks Spring Distillery Company	145.25
W. B. Samuels & Co.	58.81
M. C. Beam & Co.	57.42
Head & Parker	44.80
Blair, Osborne & Ballard Distilling Co.	42.96
Tom Moore Distillery	44.51
Brown-Forman Company	
Bernheim Distilling Company	
Mattingly & Moore Distillery Co.	
F. G. Walker Company	
Charles Kobert & Company	
Smith Distillery Company	
R. Cummins & Company	

47 It is, therefore, ordered that each of said complainants are entitled to recover of defendant the sums hereinabove respectively indicated.

It is further ordered that upon the failure of defendant to pay each of said complainants the sum set opposite their respective names as hereinabove stated, that a certified copy of this order, finding and award, together with the evidence heard, be filed by A. T. Siler, Chairman of this Commission, in the office of the Clerk of the Circuit Court of the county having jurisdiction, as provided by law, to the end that plaintiffs may recover of said defendant their respective sums.

It is further ordered that this order be recorded upon the record books of this Commission,, and that a certified copy of this order be furnished to defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*
L. P. TARLTON, *Commissioner.*
L. B. FINN, *Commissioner.*

STATE OF KENTUCKY,
County of Franklin, set:

I, D. B. Cornett, Secretary of the Railroad Commission of Kentucky, hereby certify that the above and foregoing is a true and correct copy of an order as appears of record on the Order Book in the office of the Railroad Commission of Kentucky, at Frankfort, Kentucky.

This August 10, 1910.

D. B. CORNETT,
Secretary Railroad Commission.

Exhibit "C," referred to and filed with the foregoing Bill of Complaint on Sept. 7, 1910, is in words and figures as follows, viz:—

48 "EXHIBIT C."

Copy.

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN Dad Distillery Company, Brown-Forman Co., S. Grabfelder & Co., Bernheim Distilling Co., Taylor & Williams, Tom Moore Distillery, Mattingly & Moore Distillery Co., F. G. Walker Co., Mueller, Wathen & Kobert, Charles Kobert & Co., Early Times Distillery Company, Clear Springs Distillery Company, T. W. Samuels Distillery, W. B. Samuels & Co., Willow Springs Distilling Company, Blair, Osborne & Ballard Distilling Co., M. C. Beam & Co., Head & Parker, Smith Distillery Company, R. Cummins & Co., Burks Spring Distillery Company, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

Paragraph No. 1.

Plaintiffs say that each of them is a corporation duly incorporated and empowered under the laws of Kentucky to transact the business in which they are now engaged, to contract and be contracted with, sue and be sued in their respective corporate names, and as such corporations are and were on the dates hereinafter stated engaged in the distillery business; that is to say, each and all are and were engaged in the manufacture, storage, preparation for market and sale of whiskey and other distillery products, and in the shipping of such products to and from their respective plants located upon the lines and at the following named stations of defendant, the Louisville and Nashville Railroad, to wit:—

49 Greenbrier Distillery Company, Greenbrier, Ky.,
Wright & Taylor, Chapeze, Ky.,

Old Gran Dad Distillery Company, Hobbs, Ky.,
Brown-Forman Company, St. Mary's, Ky.,
S. Grabfelder & Company, Clermont, Ky.,
Bernheim Distilling Company, Silver Creek, Ky.,
Taylor & Williams, Gethsemane, Ky.
Tom Moore Distillery, Bardstown, Ky.,
Mattingly & Moore Distillery Company, Bardstown, Ky.,
F. G. Walker Company, Bardstown, Ky.,
Mueller, Wathen & Kobert, Lebanon, Ky.,
Charles Kobert & Company, Lebanon, Ky.,
Early Times Distillery Company, Early Times, Ky.,
Clear Springs Distilling Company, Bardstown, Ky.,
T. W. Samuels Distillery, Deatsville, Ky.,
W. B. Samuels & Company, Samuels, Ky.,
Willow Springs Distilling Company, Coon Hollow, Ky.,
Blair, Osborne & Ballard Distilling Company, Chicago, Ky.,
M. C. Beam & Company, Gethsemane, Ky.,
Head & Parker, Gethsemane, Ky.,
Smith Distillery Company, Chicago, Ky.,
R. Cummins & Company, Loretto, Ky.,
Burks Spring Distillery Company, Loretto, Ky.

Plaintiffs say that defendant, Louisville & Nashville Railroad Company, is a corporation duly incorporated and operated as a common carrier in various Counties in the State of Kentucky and elsewhere, and especially to and from the points hereinafter enumerated, shown in Exhibit A hereinafter more fully referred to.

Plaintiffs say that in order to carry on and operate their respective distilleries it is and was necessary for each of them to cause to be transported over defendant's lines from various points in Kentucky, as shown by said Exhibit, to their respective plants, various
50 commodities necessary to be used by them, and as further shown by said Exhibit all for the purpose of use in the manufacture and preparation of whiskey and other distillery products for the markets.

Plaintiffs say that inasmuch as the present rates herein complained of, and the commodities upon which the same are and were assessed, as well as the former rates, points of origin and of destination, can be more conveniently compared, shown or illustrated in exhibit form, such an exhibit is hereto attached, marked "Exhibit A" and made part hereof as if fully set out herein.

Plaintiffs say that for many years prior to the 25th day of March, 1910, defendant transported over its line or lines of railroad to and from points wholly within the State of Kentucky, the various commodities shown in said exhibit, and charged, collected, and received from plaintiffs during said time the rates printed therein, from said points of origin to their said respective plants; that on the 15th day of March, 1910, defendant issued its Circular #2910 cancelling each and all of said printed rates shown in said Exhibit, and in lieu thereof—effective March 25, 1910—substituted therefor the rates designated new rates as shown by the figures inserted therein in red ink, and for the transportation of all of said Commodities to and

from the points shown in said Exhibit has ever since and still charges, collects and receives from plaintiffs the said increased rates as aforesaid.

Plaintiffs say that each and all of said increased rates so charged, collected and received from said points of origin to the respective plants of each of the plaintiffs as shown in said Exhibit, wherein the same are in excess of said former rates, are extortionate, unjust, and unreasonable; that defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said
51 former rates, and had maintained said rates for many years as just and reasonable rates, all of which were and are fairly remunerative, and were and are no more than just and reasonable compensation for the transportation of said commodities to and from said points.

Wherefore, plaintiffs pray that this Honorable Commission, after due notice herein and investigation, make and fix just and reasonable rates to and from all points and upon all commodities as shown in said Exhibit A, and that said rates be fixed no higher than those charged, collected and received by the defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates effective March 25, 1910, as hereinbefore stated; and plaintiffs pray for all other necessary orders in the premises.

Paragraph 2.

For further cause of action herein plaintiffs reiterate and reaffirm all the allegations contained in the first paragraph herein, and say that by reason of the acts upon the part of the defendant set out in Paragraph No. 1, and especially the fact that defendant has continuously charged, collected and received from plaintiffs since the 25th day of March, 1910, and continues so to do, the increased rates shown in Exhibit A filed in Paragraph No. 1, defendant to the extent of the difference between said former rates and the present rates now in effect, as set out in said first Paragraph and said Exhibit A, has and continues to charge, collect and receive from plaintiffs and each of them, extortionate, unjust and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits hereinafter filed by each of the plaintiffs herein, which latter Exhibits show the amount of such extortionate charges and collections from each of the plaintiffs to the dates therein respectively stated and which are, as follows, to wit:—

52 EXHIBIT.

1. Greenbrier Distillery Company	$532.62
2. Wright & Taylor	$257.50
3. Old Gran Dad Distillery Company	$231.38
4. Brown-Forman Company	$
5. S. Grabfelder & Co.	$325.78
6. Bernheim Distilling Co.	$

7.	Taylor & Williams	$237.19
8.	Tom Moore Distillery	$ 41.51
9.	Mattingly & Moore Distillery Co.	$
10.	F. G. Walker & Co.	$
11.	Mueller, Wathen & Kobert	$400.77
12.	Charles Kobert & Co.	$
13.	Early Times Distillery Co.	$408.51
14.	Clear Springs Distilling Co.	$481.89
15.	T. W. Samuels Distillery	$123.42
16.	W. B. Samuels & Co.	$ 58.81
17.	Willow Springs Distilling Co.	$321.62
18.	Blair, Osborne & Ballard Distilling Co.	$ 42.96
19.	M. C. Beam & Co.	$ 57.42
20.	Head & Parker	$ 44.80
21.	Smith Distillery Company	$
22.	R. Cummins & Company	$
23.	Burks Spring Distillery Co.	$145.25

Wherefore plaintiffs pray that reparation be awarded each of them for the amounts shown to be severally due from their respective Exhibits hereinbefore referred to, and that an award be made to each of them by this Honorable Commission for said respective sums; and plaintiffs pray for all further and necessary orders and proceedings to which they may be entitled in the premises.

McCHORD, HINES & NORMAN,
Attorneys for Plaintiffs.

53 Copy.

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN DAD Distillery Company, Brown-Forman Company, S. Grabfelder & Co., Bernheim Distilling Company, Taylor & Williams, Tom Moore Distillery, Mattingly & Moore Distillery Company, F. G Walker & Company, Mueller, Wathen & Kobert, Charles Kobert & Co., Early Times Distillery Company, Clear Springs Distilling Company, T. W. Samuels Distillery, W. B. Samuels & Co., Willow Springs Distilling Co., Blair, Osborne & Ballard Distilling Co., M. C. Beam & Co., Head & Parker, Smith Distillery Company, R. Cummins & Company, Burks Spring Distillery Company, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

Now comes the Defendant Louisville and Nashville Railroad Company, and for answer herein states that it is true that it increased the rates as shown in Exhibit "A" of plaintiffs, yet Defendant denies that the said increased rates so charged, collected or

Explanations of Al

C. L.—Carload. L. C. L. Less than carload. K. D.—Knocked

Net Rates in Cents Per Hundred Lb

To—	From—	Bbl. & box m'f'd, K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty. C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.	
		Old.	New.	Old.	New.	Old.	New.	Old.	New.
			[§]		[§]		[§]		[§]
Bardstown, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	11	*11	23	28	14	28	43	43
"	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Chapeze, Ky.	Louisville (proper) Ky.	5	5	13	23	9	13	20	20
Chicago, Ky.	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Clermont, Ky.	Louisville, Ky. (proper)	6	5	15	13	9	13	23	20
Coon Hollow, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	12	12	20.5	34	14	34	37.5	50
"	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Deatsville, Ky	Louisville, (proper), Ky.	6	6	15	15	9	15	23	23
Early Times, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Gethsemane, Ky.	Louisville, (proper) Ky.	6	7	15	21	10	21	26	30
Greenbrier, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Hobbs, Ky.	Louisville, (proper) Ky.	6	5	15	13	9	13	23	20
Hunters, Ky.	Louisville (proper) Ky.	6	5	15	13	9	13	23	20
Lebanon, Ky.	Louisville (proper) Ky.	7	8	15	26	10	26	26	39
Loretto, Ky.	Louisville (proper) Ky.	7	7	15	23	10	23	26	34
St. Marys, Ky.	Louisville (proper) Ky.	7	8	15	24	10	24	26	35
Samuels, Ky.	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Silver Creek, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	10	10	19	19	12	19	35	35
"	Louisville (proper) Ky.	10	10	19	19	12	19	35	35

NOTE:

* New minimum 10,000 lbs. per 100 lbs.
† " " 24,000 lbs.
§ Boxes, wooden, empty. C. L. minimum 15,000 lbs.
§ Columns marked thus written in red ink.

Exhibit D.

Explanations of Abbreviations.

L. C. L. Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

Net Rates in Cents Per Hundred Lbs. Unless Otherwise Specified.

Bbl. & box m'f'l, K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty, C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.		Bottle covers, paper or straw, packed or pressed in bales. C. L., min. wt. 15,000 lbs.		L. C. L.		Bottles, common, packed, released. C. L., min. wt. 24,000 pounds.		L. C. L.		Boxes, empty, any qty.		Cow, rye, malt, barley, C. L., min. wt. 24,000 lbs.		Iron, hoop, C. L., min. wt. 24,000 pounds.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.
	[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]
11	*11	23	28	14	28	43	43	23	†28	29	32	25	30	31.5	37	28	†28	10	16	....	..
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
5	5	13	23	9	13	20	20	13	13	17	15	10	14	15	17	13	13	5	8	8	13
7	7	15	22	10	22	26	32	15	22	23	28	17	24	20	28	15	22	6	10	12.5	21
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
12	12	20.5	34	14	34	37.5	50	20.5	34	33	38	23.5	36	28.5	44	21.5	34	11	18	17	29
7	7	15	22	10	22	26	32	15	22	23	26	17	24	20	28	15	22	6	10	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	7	15	21	10	21	26	30	15	21	20	23	17	22	20	27	15	21	6	10	12.5	21
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
7	8	15	26	10	26	26	39	15	26	23	31	17	25	20	34	15	26	6	11	12.5	21
7	7	15	23	10	23	26	34	15	23	23	26	17	25	20	30	15	23	6	11	12.5	21
7	8	15	24	10	24	26	35	15	24	23	28	17	26	20	31	15	24	6	11	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..

75,040 lbs.
ok.

received from the points of origin mentioned in the petition to the respective plants of the plaintiffs, as shown in the aforesaid Exhibit, are extortionate or unjust, or unreasonable, and it further denies that this Defendant induced the plaintiffs, or each of them or any of them, to expend large sums of money in the erection of, or in making any additions to, their several plants, upon the faith of said former rates. While it is true it had maintained said rates for many years, it denies that these rates were fairly remunerative, and denies that said rates as they formerly were, prior to said advancement, were or are fairly remunerative, or that they were or are no more than just or reasonable compensation for the transportation of said commodities to or from said points.

54 It further denies that said increased rates are extortionate, unjust or unreasonable for the transportation of the commodities named in Exhibit "A," or the several Exhibits filed by the complainants herein, and denies that the complainant Greenbrier Distillery Company is entitled to recover the sum of $532.62, or any other sum.

Defendant further denies that the plaintiff T. W. Samuels Distillery is entitled to recover $123.48, or any other amount; that the Early Times Distillery Company is entitled to recover $408.51, or any other amount; that Mueller, Wathen & Kobert is entitled to recover $400.77, or any other amount; that Tom Moore Distillery is entitled to recover $44.51, or any other amount; that W. B. Samuels & Company is entitled to recover $18.81, or any other amount; that M. C. Beam & Company is entitled to recover $57.42, or any other amount; that Old Gran Dad Distillery Company is entitled to $231.58, or any other amount; that Head & Parker is entitled to $44.80, or any other amount; that Wright & Taylor is entitled to recover $257.50, or any other amount; that Clear Springs Distilling Company is entitled to $481.89, or any other amount; that S. Grabfelder & Company is entitled to $325.78, or any other amount; that Taylor & Williams is entitled to recover $237.19, or any other amount; that Willow Springs Distilling Company is entitled to $321.62, or any other amount, that Blair, Osborne & Ballard Distilling Co. is entitled to $42.96, or any other amount.

Wherefore, having fully answered, this defendant prays that the complaint be dismissed, and for all proper relief in the premises.

(Signed) WM. G. DEARING,
Attorney, L. & N. R. R.

Filed Sept. 7, 1910. Chas. N. Wiard, Clerk.

Exhibit "D," referred to and filed with the foregoing Bill of Complaint on Sept. 7, A. D., 1910, is in words and figures as follows, viz:

(Here follows table, marked page 55.)

56 On the same day, to wit: on the 7th day of September, A. D., 1910, Subpœna in Chancery was issued in said cause, which is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

The President of the United States of America to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in October next, to answer a bill in equity exhibited against them in our said Court, by Louisville and Nashville Railroad Company and this they shall in nowise omit, under the penalty of four hundred dollars; and have you then there this writ.

In testimony whereof, John M. Harlan, Esq., Senior Associate Justice of the Supreme Court of the United States of America, hath caused the Seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frankfort, this 7th day of September, A. D., 1910, and in the 135th year of our Independence.

Attest:

CHAS. N. WIARD, *Clerk.*
By MARY SCOTTOW, *Deputy.*

Memorandum.

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in October 1910; otherwise the said Bill may be taken pro confesso.

CHAS. N. WIARD, *Clerk.*
By MARY SCOTTOW, *D. C.*

The Marshal's return on the foregoing Subpœna in Chancery is in words and figures as follows, viz:

57 Received this Subpœna at Frankfort, Ky., on the 7th day of September, 1910, and executed same by delivering a true copy of same to each of the within named defendants, at Frankfort, Ky., on Sept. 7, 1910.

A. B. PATRICK,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

Fee $6.00.

The foregoing Subpœna in Chancery was returned and filed on Sep. 8, 1910 & endorsed as follows:

Filed Sep. 8, 1910. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 7th day of September, A. D. 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

58 Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky, at Frankfort, Wednesday September 7, 1910.

Court met pursuant to adjournment.
Present: Honorable A. M. J. Cochran, Judge.

#686.

Louisville and Nashville Railroad Company, Complainant,
versus
Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The Complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the Bill of Complaint, and said Motion is now fixed for hearing on the 26th day of September 1910, at 2 P. M., in the Court Room in the City of Frankfort, Kentucky, and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction unless said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted and that Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force or effect their orders of August 10, 1910, reducing the railroad rates of the Complainant on intrastate freight, being the following named commodities between the points of origin and point of destination, and making and fixing the rates as herein below named, to wit:

C. L.—Car Load. L. C. L.—Less Car Load. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

Rates in Cents Per Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; min. wt., 30,000 lbs.		Bbls., empty; minimum, 120 bbls. per bbl.	Bots. caps, metal, any quantity	Bots., boys, paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Bots., comm., packed or released; min. wt., 24,000 lbs.		Boxes, empty; any quantity	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington (prop.), Ky.											
	Newport (prop.)	11	23	14	43	23	29	25	31½	28	10	..
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Chapeze,	Louisville, Ky.	5	13	9	20	13	15	10	15	13	5	8
Chicago,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Clermont,	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	..
Coon Hollow,	Covington, Ky.											
	Newport, Ky.	12	20½	14	57½	20½	33	23½	28½	21½	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Deatsville,	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Early Times,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Gethsemane,	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12½
Greenbrier,	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	..
Hobbs,	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	..
Lebanon,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Loretto,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
St. Marys,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Samuels,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Silver Creek,	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	..
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	..
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	..
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

60 or putting into force and effect the schedule of said rates or any of them, and said defendants also are restrained and enjoined, individually and jointly, as constituting said Railroad Commission of Kentucky, from recommending or causing to be instituted any prosecution by indictment or other legal proceeding against the Complainant or any of its officers agents, or employés to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever for or on account of Complainant's failure or refusal to put into force and effect the Railroad Commission's orders or any of them aforementioned, or the rates fixed and prepared thereunder, and said defendants are also restrained and enjoined, individually and jointly as constituting the Railroad Commission of Kentucky, and especially Adam T. Siler, as Chairman of said Railroad Commission, is enjoined from taking any steps to enforce the Order, Finding, and Award of August 10, 1910, whereunder, among other things, award of reparation was ordered to be made by this complainant to the Greenbrier Distillery Company and other plaintiffs, and is especially enjoined from filing a certified copy of said Order, Finding, and Award of August 10, 1910, with or without the evidence heard, in the Office of the Clerk of the Circuit Court of any County having jurisdiction as provided by law, or of any County into or through which the line or lines of road owned or operated by this Complainant carrying the freight as to which the award of reparation in said Order, Finding, and Award was made, or of any other County within the State of Kentucky; and that said defendants, individually and jointly as aforesaid, are so restrained and enjoined until a hearing upon said application for writ of injunction and the further order of the Court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion, if they so desire. The first day of the next September Term of this Court at Frankfort, is fixed because it is thought by the Court that it is more convenient to the parties to hear the motion at that place.

61 On the same day, to wit, on the 7th day of September, A. D. 1910, a temporary restraining order was issued, which was and is in words and figures as follows, to wit:

Copy of Restraining Order.

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky, at Frankfort, Wednesday, September 7, 1910.

Court met pursuant to adjournment.
Present: Honorable A. M. J. Cochran, Judge.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The complainant moved the court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 26th day of September, 1910, at 2 p. m., in the court room in the city of Frankfort, Kentucky.

And it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing
62 of said application for the writ of injunction unless said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted and that Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force or effect their orders of August 10, 1910, reducing the railroad rates of the complainant on intrastate freight, being the following named commodities between the points of origin and points of destination, and making and fixing the rates as herein below named, to-wit:

Rates in Cents Per One Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; minimum wt., 30,000 lbs.		Bbls., empty; min., 120 bbls., per bbl.	Bottle cans, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Bots., com., packed or released; minimum wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop, min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Newport, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Chapeze	Louisville, Ky	5	13	9	20	13	15	10	15	15	5	8
Chicago	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Clermont	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	....
Coon Hollow	Covington, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Newport, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Deatsville	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Early Times	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Gethsemane, Ky.	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12.5
Greenbrier	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	....
Hobbs	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	....
Lebanon	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Loretto	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
St. Marys	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Samuels	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Silver Creek	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	....
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	....
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	....
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

Explanation of Abbreviations.

C. L.—Carload. **L. C. L.**—Less Carload. **K. D.**—Knocked Down. **Lbs.**—Pounds. **Min.**—Minimum. **Wt.**—Weight. **Bots.**—Bottles. **Bbl.**—Barrel.

or putting into force and effect the schedule of said rates or any of them, and said defendants also are restrained and enjoined, individually and jointly, as constituting said Railroad Commission of Kentucky, from recommending or causing to be instituted any prosecution by indictment or other legal proceeding against the complainant or any of its officers, agents, or employés to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever for or on account of complainant's failure or refusal to put into force and effect the Railroad Commission's orders or any of them aforementioned, or the rates fixed and prepared thereunder, and said defendants are also restrained and enjoined, individually and jointly as constituting the Railroad Commission of Kentucky, and especially Adam T. Siler, as Chairman of said Railroad Commission, is enjoined from taking any steps to
63 enforce the order, finding, and award of August 10, 1910, whereunder, among other things, award of reparation was ordered to be made by this complainant to the Greenbrier Distillery Company and other plaintiffs, and is especially enjoined from filing a certified copy of said order, finding, and award of August 10, 1910, with or without the evidence heard, in the office of the clerk of the circuit court of any county having jurisdiction as provided by law, or of any county into or through which the line or lines of road owned or operated by this complainant carrying the freight as to which the award of reparation in said order, finding, and award was made, or of any other county within the State of Kentucky; and that said defendants, individually and jointly as aforesaid, are so restrained and enjoined until a hearing upon said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion, if they so desire.

The first day of the next September term of this court at Frankfort is fixed because it is thought by the court that it is more convenient to the parties to hear the motion at that place.

September 7, 1910.

A. M. J. COCHRAN, *Judge.*

64 UNITED STATES OF AMERICA,
Eastern District of Kentucky:

I, Chas. N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing is a true and complete copy of the order made and entered September 7, 1910, in the case of Louisville & Nashville Railroad Company against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, as the same appears from the files and records of this office.

Witness my hand as clerk of said court, and the seal thereof, at Frankfort, in said district, this 7th day of September, A. D. 1910, and of our Independence the 134th year.

CHAS. N. WIARD, *Clerk,*

[SEAL.] By MARY SCOTTOW, *D. C.*

The foregoing Restraining Order was returned and filed on Sept. 17, 1910, with the following returns endorsed thereon by the Marshals, to wit:

Received this process at Frankfort, Ky., on Sept. 8, 1910, and executed on the said day, at said place, on Lew P. Tarlton, individually, and as a member of the Railroad Commission of Kentucky, the other defendants not found in my bailiwick.

Fees $2.00.

A. B. PATRICK,
U. S. Marshal,
By N. I. McDANIEL, *D. M.*

Received this process at Williamsburg, Ky., on Sept. 10, 1910, and executed same on said day at said place on A. T. Siler,
65 R. R. Commissioner of Kentucky. The other defendants not found in my baliwick.

Fees $2.00.

A. B. PATRICK,
U. S. Marshal,
By LESTER PEACE,
D. U. S. M.

Received this restraining order and one copy at Bowling Green, Ky., on the 12th day of September, 1910, and executed same at Bowling Green, Ky., on the 12th day of September, 1910, by delivering a true copy hereof to the within named Lawrence B. Finn.

This Sept. 12, 1910.

G. W. LONG,
U. S. Marshal.
By J. A. WISE, *Deputy.*

Fees $2.00
Expense ... 1.24

$3.24

66 On a day following, to wit: on the 26th day of September, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, to wit:

United States Circuit Court, Eastern District of Kentucky, Frankfort Division, September 26, 1910.

Proceedings of the Circuit Court of the United States for the Sixth Judicial Circuit and Eastern District of Kentucky, at a regular term begun and held at the Federal court room in the city of Frankfort on Monday, September 26, 1910.

Court met.
Present: Hon. A. M. J. Cochran, Judge.

686.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
ADAM T. SILER et al.

This cause coming on to be heard upon the motion of the complainant for a preliminary writ of injunction, came the complainant by Henry L. Stone, its counsel, and the defendants by James Breathitt, Jno. F. Lockett, and McChord and Hines, their counsel.

The defendants by their said counsel filed a demurrer to part of the bill and a demurrer to the whole of the bill, also the affidavits of Adam T. Siler, Lawrence B. Finn, R. H. Edelen and W. A. Miller and by consent are granted further time to prepare and file the affidavit of Lew P. Tarlton, all of said affidavits to be read and considered on the hearing of said motion.

The complainant filed the affidavits of C. B. Compton and D. M. Goodwyn to be read and considered upon said hearings.

Whereupon the judge of this court now sitting declined to sit further in this case and stated that he would certify this fact to the Honorable Henry F. Severens, presiding circuit judge for this circuit that the matter could be properly heard and determined.

67 The affidavit of C. B. Compton, referred to in the foregoing order and filed on September 26, 1910, by the complainant, is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of C. B. Compton.

Filed by Complainant in Court September 26, 1910.

The affiant, C. B. Compton, states that he is 55 years of age; resides in Louisville, Kentucky; and has been for the past nine and one-half years traffic manager of the Louisville & Nashville Railroad Company, complainant herein; that he has had over thirty-eight years' experience in the railroad business, having served the Louisville & Nashville Railroad Company during that period in various clerkships in the Freight Department and as local agent, contracting freight agent, general agent, general freight agent, and traffic manager.

Affiant states that he is familiar with the freight rates of said company, and that during his employment as general freight
68 agent and traffic manager he has been directly connected with the making of said freight rates, and that in the performance of his duties it has been necessary for him to investigate, analyze and constantly keep in touch with the numerous and varying conditions surrounding and affecting the freight business of the company and of the various cities and communities served by it; and that by reason of their influence on the interests of said company it has also been necessary for him to investigate and analyze the geographical, physical, commercial and industrial conditions prevailing in the State of Kentucky and other States in the territory south of the Ohio and Potomac rivers and east of the Mississippi River, in which territory lies the greater part of the railroad of said Louisville & Nashville Railroad Company. Affiant further says that he has also, but to a lesser extent, investigated and analyzed traffic conditions existing in other territories within the United States.

Affiant states that he is familiar with the subject matter of this proceeding, and that by reason of his experience and employment he is qualified to testify concerning the same.

Affiant states that for a long time prior to March 25, 1910, as a means of promoting, encouraging and increasing the manufacture of whiskey and the shipment thereof by way of its lines of railroad, said railroad company gave to the distilleries located along its lines

of railroad in Kentucky r[illegible] for the transportation of their
69 supplies, such as corn, rye, malt, barley, barrel and box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., which were less than the rates charged by said railroad company between the same points of origin and destination upon the same articles when intended for and devoted to uses other than the manufacture and shipment of whiskey; that the giving of said special rates upon said articles, characterized as distillers' supplies, extended as far back as 1874, the said rates being made from season to season as the conditions and exigencies of the distillery business seemed to require; that until January 1, 1899, all of said special rates were made or constructed upon the same general basis, but upon that date still lower special rates were given said distillers on their corn, rye, malt and barley, because of the extremely depressed condition of the whiskey trade at that time; that until the passage by Congress of the so-called Hepburn Act, amending the Act to Regulate Commerce, all of said special rates were applied to both interstate and intra-state shipments; that shortly thereafter the Interstate Commerce Commission objected to the restricted application of said special rates upon interstate traffic, and also to the method of protecting them, to-wit, by billing said shipments at the standard rates and subsequently refunding to said distillers the difference between said standard rates and said special rates applicable to articles used in the manufacture and shipment of whiskey, whereupon said railroad company cancelled and withdrew said
70 special rates as to all inter-state traffic and thereafter, until March 25, 1910, applied them only to intra-state traffic within the State of Kentucky.

Affiant states that thereupon, and thereby said railroad company was likely to be forced into discrimination between intrastate and interstate traffic of the same character used for the same purpose between the same points of origin and destination; that in his capacity aforesaid, affiant investigated the history of said special rates and reached the conclusion that the conditions which had justified the making of them in the beginning had disappeared; that said distillers were established upon a firm business footing and no longer needed the assistance that had been extended to them by means of said special rates; that said special rates were not a matter of contract between said distillers or any of them and said railroad company, but had been made and extended to them as the voluntary act of said railroad company in its efforts to promote, encourage and increase the manufacture of whiskey and the shipment thereof over its lines of railroad; and affiant states that upon reaching such conclusion he, in his capacity aforesaid, cancelled and withdrew said special rates in their entirety; that since the date of said concellation and withdrawal, namely, March 25, 1910, the said railroad company has charged and collected, for the transportation of corn, rye, malt, barley, barrel and box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., consigned to distillers and intended for use in the manufacture and

shipment of whiskey, exactly the same rates as had been
71 and were being charged and collected between the same points of origin and destination upon the same articles where consigned to other persons and intended for other uses; and that by and as the result of said action, said railroad company removed every sort and species of discrimination theretofore existing with respect to its traffic in said articles.

Affiant states that in view of the disappearance and cessation of the conditions which had originally justified the voluntary concessions to said distillers represented by said special rates, the said rates had become unjustly, unreasonably and absurdly low and a moral offense against those persons who were paying the higher or standard rates of said company, upon said articles when intended for and devoted to other uses than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines and upon its lines in the numerous other States in which said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States.

Affiant states that there was not then and has not been since, any complaint made by shippers or receivers of said articles when intended for and devoted to uses other than the manufacture and shipment of whiskey who had previously
72 paid, were then paying, and have since continued to pay the higher or standard rates of said railroad company, but that soon after the cancellation and withdrawal of said special rates, various distillers who had been beneficiaries thereof filed a complaint with the Railroad Commission of Kentucky against said railroad company praying, amongst other things, for an order requiring and compelling it to restore said special rates. Affiant is informed and believes that no shipper, receiver or user of said articles for purposes other than the manufacture and shipment of whiskey was a party to said complaint, or took any part in the prosecution thereof.

Affiant states that on the 10th day of August, 1910, said Railroad Commission of Kentucky entered certain orders among other things declaring the rates then charged for the transportation of said articles (which said rates were the standard rates of said Louisville & Nashville Railroad Company as hereinbefore described) to be extortionate, unjust and unreasonable, and forbidding said railroad company to charge, collect or receive, for the transportation of said articles, rates in excess of those which said railroad company had prior to March 25, 1910, applied to said articles when intended for and used in the manufacture and shipment of whiskey. Affiant states, in other words, that said orders were intended to

and did have the effect of fixing rates to be charged by said railroad company for the transportation, between the points specified therein of the articles named without reference to the uses or purposes to which such articles were to be applied by the consignees thereof; and of commanding and requiring said railroad company to apply the said rates to the shipments of said articles made by any and all persons, whether manufacturers and shippers of whiskey or otherwise and wholly without regard to the uses or purposes to which said articles were to be applied by the consignees thereof.

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Affiant states that said orders of said Railroad Commission of Kentucky are arbitrary, unreasonable and unjust:

First. Because they seek to compel said railroad company to perpetuate the special rates voluntarily given by it to said distillers, notwithstanding the conditions in consideration of which said railroad company granted said rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

Second. Because they seek to compel said railroad company to apply the said rates to the traffic in said articles of any and all persons shipping from and to the points specified, thus giving to said special rates a broader application than was ever voluntarily given by said railroad company, notwithstanding the fact that as between said railroad company and the shippers, receivers and users of said articles for other purposes than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Third. Because the said orders, in seeking to compel said railroad company to apply upon said articles between the points specified rates which are materially less than are applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates without distinction or discrimination between all points on its lines in the State.

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Fourth. Because said orders, if enforced, will compel said railroad company to discriminate in favor of intrastate traffic and against interstate traffic of the same character between the same points in the State of Kentucky, or else to apply the said rates without distinction or discrimination to both intrastate and interstate traffic between all points in said State of Kentucky.

Fifth. Because the said orders, if enforced, will compel said railroad company to charge materially less rates in one direction than in the other between the same points, on both intrastate and interstate traffic, or else to apply said rates without distinction or discrimination in both directions between all points.

Sixth. Because said orders, if enforced, will compel said railroad company to charge less rates upon corn, rye, malt and barley than upon wheat, oats and other kinds of grain where said railroad company has always endeavored to charge the same rate upon all kinds

of grain, or else to apply the rates fixed in said orders to all kinds of grain upon both intrastate and interstate traffic.

Seventh. Because said orders, if enforced, will compel said
75 railroad company to charge less rates upon carload quantities of grain, where said railroad company has always endeavored to charge the same rate upon carload as upon less than carload quantities, or else to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

Eight. Because said orders, if enforced, will compel said railroad company to accept upon interstate as well as intrastate traffic, rates which are absurdly, unusually, unjustly and unreasonably low, both per se and relatively, and which will not yield to said railroad company fair and reasonable compensation for the service performed, and which will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use, upon interstate as well as intrastate traffic.

Ninth. Because said orders, if enforced, will compel said railroad company to charge a less rate for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income upon interstate as well as intrastate traffic, with no compensating benefits whatsoever and in the face of the fact that there has been in
76 the last few years a heavy increase in the cost of labor, material, supplies and every other element entering into the expense of operating said railroad company's lines.

In substantiation of the facts, conclusions and opinions set forth in the ten paragraphs immediately preceding, affiant states:

First. The concessions represented by said special rates on distillers' supplies, were first granted by said railroad company at a time when the distilling industry upon its lines in Kentucky was in a demoralized and precarious condition, because of their competition with the manufacturers of cheap whiskey and with blenders and rectifiers located on and north of the Ohio River. Said industry was carried on at small country points where primarily an abundant supply of pure water could be relied upon, and where it was expected the surrounding farms would furnish some portion of the grain necessary for distilling purposes. It was also expected that immunity from city taxes and other expenses incidental to manufacturing within the cities would tend to minimize the cost of production. In course of time, however, the inroads of the competition referred to, coupled with failure of grain crops, drouths and other unfor-seen happenings, placed said country distillers at a material disadvantage; in that they were frequently compelled to bring in from distant points grain, water, fuel and supplies of all kinds, the transportation charges upon which added materially to the cost of

their product. The few distillers who were making high grade special brands were not materially affected by the majority,
77 who were turning out the ordinary grades, found their markets being gradually closed to them by reason of the high cost of their supplies, and their competition with manufacturers of cheap whiskey and with blenders and rectifiers on and north of the Ohio River. In this situation said Louisville & Nashville Railroad Company, finding itself about to be deprived of the whiskey traffic which it had as a matter of business policy, labored to build up and maintain, made common cause with its distillers and voluntarily gave to them an unusually low scale of rates on their grain and supplies in the expectation and assurance that they would be withdrawn whenever the conditions changed for the better. For these reasons, said railroad company never guaranteed said rates or promised to protect them beyond the end of the current distilling season, and invariably thereafter said rates were restored, revised and modified from season to season as existing conditions seemed to require. Affiant states that as a result of said co-operative action, the distilling industry upon said railroad company's lines in Kentucky gradually recovered its footing, and that at the present time there are forty-eight of these country stations on its lines in Kentucky at which distilleries are located, namely:

Athertonville	Early Times	Levingood
Bardstown	Eminence	Loretto
Berry	Falmouth	Lotus
Bloomfield	Garnett	Memphis Junction
Bourbon	Gethsemane	Morgan
Boyd	Gilbert	Nazareth
Calvary	Greenbrier	New Hope

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Campbellsville	Haden	Poindexter
Chapeze	Hobbs	Robinson
Chicago	Hunters	St. Marys
Clermont	Jett	Samuels
Coon Hollow	Kellers	Shawhan
Crab Orchard	Kiserton	Silver Creek
Cynthiana	Lair	Silver Springs
Dants	Lancaster	Willow Springs
Deatsville	Lebanon	Withrow

Affiant is informed and believes that the disadvantages under which said industry labored in the beginning and for many years thereafter have entirely disappeared, and that it is not only no longer in need of the special rates which under the conditions then existing said railroad company gladly gave, but affiant believes and states that in the past few years enormous fortunes have been made from the distilling industry along its lines in Kentucky, and that there is no longer any reason or justification for extending to said industry lower rates on any articles necessary to the manufacture and shipment of whiskey, than the standard rates of said company

as applied to the same articles when intended for and devoted to other uses. During the time that said rates were in effect, affiant states that said railroad company was influenced solely by the representations of said distilling interests that without such assistance the distilleries could not be kept in operation, and by the certain knowledge that their closing down would take away from said railroad company, a large and fairly profitable traffic in the transportation of whiskey from said distilleries to the markets of consumption, affiant states that it was never contemplated or expected that said
79 rates would be perpetuated or even extended beyond the end of the current season; but affiant states that the said orders of the Railroad Commission of Kentucky, if enforced, will perpetuate said rates.

Second. Affiant states that the said special rates given on distillers' supplies prior to March 25, 1910, were materially lower in the majority of instances than the standard rates that were simultaneously charged from and to the same points on the same articles when intended for and devoted to other uses than the manufacture and shipment of whiskey, and in substantiation thereof prays leave to refer to Exhibit D to the bill of complaint herein. Affiant further prays leave to explain that said exhibit is incomplete, in that while it shows certain of the distillers' rates (indicated in black or typewritten figures) to have been greater than the standard rates (indicated in red ink figures), it failed to show that in such cases the distillers received the benefit of the lower rates and were not required to pay the rates indicated in the exhibit. Affiant states that at the time of its transportation, all the property described, whether for distillers' use or for other purposes, was charged for on basis of the standard rates indicated in red ink, and that the special distillers' rates were protected by refunding the excess upon the filing of a claim by the distiller, and the submission by him of evidence that the property had been used in the manufacture and shipment of whiskey, and for that reason no claims were ever filed and no refunds could be made where said standard rates were either the same
80 as or less than the distillers' rates indicated in black ink.

Affiant further states that said distillers' rates were frequently renewed from season to season without checking the same against and making alterations to correspond with the changes in the standard rates then current, and that that omission accounts for all those instances where said Exhibit D shows the distillers' rates to have been greater than the standard rates.

Affiant states that said Exhibit D shows that on barrel and box material in carloads, the distillers' rates were either as low as or one cent per 100 pounds less than the standard rates.

That on box and barrel material in less carload quantities, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on empty barrels in carloads, the distillers' rates were from four to sixteen cents per barrel less than the standard rates.

That on metal bottle caps, regardless of quantity, the distillers'

rates were either as low as or from four to thirteen cents per 100 pounds less than the standard rates.

That on bottle covers in carloads, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on bottle covers in less carload quantities, the distillers' rates were either as low as or from three to eight cents per 100 pounds less than the standard rates.

That on bottles in carloads, the distillers' rates were either as low as or from four to twelve and one-half cents per 100 pounds less than the standard rates.

81 That on bottles in ten carload quantities, the distillers' rates were either as low as or from two to fourteen cents per 100 pounds less than the standard rates.

That on empty boxes, regardless of quantity, the distillers' rates were either as low as or from six to twelve and one-half cents per 100 pounds less than the standard rates.

That on hoop iron in carloads, the distillers' rates were from five to twelve cents per 100 pounds less than the standard rates.

Affiant states that the rates shown on said Exhibit D in red ink and herein characterized as standard rates, were and are the rates charged by said railroad company upon the commodities named when intended for and devoted to any and all purposes other than the manufacture and shipment of whiskey, and are also the rates that have been charged on distillers' supplies since March 25, 1910.

Affiant states, therefore, that the direct and immediate effect of said orders, if enforced, will be to compel said railroad company to transport said articles for any and all persons, from and to the points named on basis of said distillers' rates irrespectively of the uses to which said articles are to be applied; that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified; that a large proportion of such movement is and will be devoted to uses other than the manufacture and shipment of whiskey and that to the extent that said articles are not applied to the manufacture and shipment of whiskey

82 said railroad company will be compelled to apply said distillers' rates thereon without receiving in any way, shape or form the considerations and benefits that induced it in the beginning and for a long time thereafter to give said rates to said distillers, and that the difference between the revenue accruing on said articles on basis of the just and reasonable standard rates of said railroad company and on basis of said distillers' rates ordered to be applied thereto by said orders of the Railroad Commission will amount to many thousands of dollars annually, and to that extent constitute irrevocable loss of revenue to said railroad company.

Third. Affiant states that the standard rates of said railroad company as applied to said articles when devoted to other uses than the manufacture and shipment of whiskey from and to the points specified, are made upon the same scale or basis that has been employed for a great many years by said railroad company in making its rates on said articles from and to other points in the State of Kentucky;

that the points of destination specified in said orders, sixteen in number, constitute but one-third of the country stations on said railroad company's lines in Kentucky at which distilleries are located, and constitute but a very small proportion of the number of destinations on said railroad company's lines in Kentucky to which there is and will continue to be a movement of traffic in said articles; that, therefore, the effect of said orders, if literally enforced, will be to compel said railroad company to give lower rates to the points of destination specified in said orders than to the numerous other points
83 of destination on its line in the State, and thus compel it to unjustly discriminate in favor of the sixteen points of destination embraced in said orders and against the numerous other points of destination not embraced therein. Affiant states that he is thoroughly familiar with the circumstances and conditions attending the movement of said articles in the State of Kentucky and existing at the various points of destination on said railroad company's lines in said State, and that in his opinion, based upon his knowledge and experience, no circumstance or condition exists by reason of which the sixteen points of destination embraced in said orders are morally or equitably entitled to a lower plane of rates on said articles than has been and is extended by said railroad company to the numerous points of destination not embraced in said order.

Affiant states that such unjust discrimination inevitably resulting from a literal enforcement of said orders, can only be avoided by said railroad company's reducing its standard rates on said articles all over the State to the level of the rates fixed in said orders to said sixteen points of destination embraced therein, and that as the movement of said articles is large and important, such action on the part of said railroad company would subject it to the loss of a considerable portion of its legitimate income without any compensating benefits whatsoever.

Fourth. Affiant states that all of the articles used by said distillers in the manufacture and shipment of whiskey are produced in other States as well as in Kentucky; that said distilling industry
84 has grown to such magnitude that it is no longer possible to secure all of said articles within the State of Kentucky; that for that reason a considerable volume of said articles has moved, is moving and will continue to move in interstate commerce from points in other States to said distillery points in the State of Kentucky; that there are no through rates on said articles from points outside the State to points within the State, and that, therefore, the transportation charges on such articles in interstate commerce are assessed by combining the rate from the point of origin to Louisville, Ky., to Covington, Ky., or to Newport, Ky. (at which point such shipments enter the State) with the rates from those points to the points of destination in Kentucky; that prior to the passage of the so-called Hepburn Act amending the Act to Regulate Commerce, said railroad company in assessing its rates made no distinction between intrastate and interstate commerce, but charged from Louisville, Ky., from Covington, Ky., and from Newport, Ky., to said distilling points in Kentucky, exactly the same rate upon shipments

coming from without the State as upon shipments originating at Louisville, Covington or Newport proper, and in affiant's opinion, no circumstance or condition exists by reason of which shipments of said articles originating at Louisville, Covington or Newport are entitled to be transported to said distilling points at less rates than are assessed from those points on interstate shipments coming from without the State. Affiant states that the Interstate Commerce Commission objected to said railroad company's charging less
85 rates upon shipments of said articles when intended for and devoted to the manufacture and shipment of whiskey than when intended for and devoted to other uses, holding that said railroad company had no right to dictate the uses to which the property transported should be put; that by reason of such objection said railroad company ceased to apply said distillers' rates, and thereafter charged on interstate shipments of said articles the higher or standard rates set forth in red ink on Exhibit D to the Bill of Complaint herein, because said railroad company could not stand the heavy losses of revenue that would have resulted from the application of said distillers' rates in the manner stipulated by said Interstate Commerce Commission, namely, by applying them without restriction to the shipments of said articles by any and all persons from and to the points in question; that thereafter, when interstate shippers complained of being discriminated against, affiant knew of no circumstance or condition existing to justify the difference between its intrastate and interstate rates on said articles, and was informed and believed that if said complaint were prosecuted to a conclusion the Interstate Commerce Commission would compel said interstate rates to be reduced to the level of said intrastate rates and be applied to all shipments of said articles whether intended for and devoted to the manufacture and shipment of whiskey or to other purposes; that thereupon the said distillers' rates were cancelled and withdrawn in their entirety and all shipments of said articles were thereafter charged for at the same rate whether intrastate or interstate
86 and whether intended for and devoted to the manufacture and shipment of whiskey or to other uses, and since March 25, 1910, said railroad company has not been guilty of any discrimination whatsoever in the application of its rates upon said articles. But affiant states that said orders, if enforced, will revive and renew the discrimination formerly existing and that in removing the same said railroad company will have no recourse but to reduce its interstate rates from and to the points therein specified to the level of the intrastate rates thus fixed by said Railroad Commission, and when that is done another unjustifiable discrimination will be created as between the points of destination embraced in said orders and numerous other points in the State.

As illustrative of the various discriminations that will arise from the enforcement of said orders, affiant prays leave to submit the following table of rates on corn, rye, malt and barley from Louisville to Lebanon and to stations intermediate to and beyond Lebanon

Corn, Rye, Malt, and Barley.

From Louisville, Ky., to—	Distance.	Rates now charged, both State & interstate, irrespective of use to which devoted.	Rates fixed in order of Ky. R. R. Com.	Rates which must be established, both State and interstate, to prevent unjust discrimination and violation of long & short haul principle.	Amount of reduction.
Strawberry, Ky.	6	5	..	..	..
Hoertz, Ky.	8	5	..	..	..
South Park, Ky.	10	5	..	..	..
Coral Ridge, Ky.	11	6	..	6	..
Brooks, Ky.	13	6	..	6	..
Tappan, Ky.	14	6	..	6	..
Hubers, Ky.	15	6	..	6	..
Gap in Knob.	16	7	..	6	1
Shepherdsville, Ky.	18	7	..	6	1
Salt River, Ky.	19	7	..	6	1
Bardstown Jct., Ky.	22	8	..	6	2
Belmont, Ky.	25	8	..	6	2
Lebanon Jct., Ky.	30	8	..	6	2
Smith's Switch, Ky.	33	9	..	6	3
Boston, Ky.	34	9	..	6	3
Beech Fork, Ky.	37	9	..	6	3
Nelsonville, Ky.	39	9	..	6	3
Lyons, Ky.	43	10	..	6	4
Athertonville, Ky.	44	10	..	6	4
New Haven, Ky.	45	10	..	6	4
Gethsemane, Ky.	48	10	6	6	4
New Hope, Ky.	50	10	..	6	4
Willow Spring, Ky.	51	10	..	6	4
Coon Hollow, Ky.	52	10	6	6	4
Dants, Ky.	53	10	..	6	4
Chicago, Ky.	55	10	6	6	4
Loretto, Ky.	57	11	6	6	5
Lofty, Ky.	61	11	..	6	5
St. Marys, Ky.	62	11	6	6	5
Lebanon, Ky.	67	12	6	6	6
Matson, Ky.	68	12	..	7	5
Amboy, Ky.	72	12	..	7	5
Penicks, Ky.	73	12	..	7	5
Wanda, Ky.	74	13	..	7	6
Rileys, Ky.	77	13	..	7	6
Gravel Switch, Ky.	79	14	..	7	7
Aliceton, Ky.	81	14	..	7	7
Brumfield, Ky.	84	14	..	8	6
Mitchellsburg, Ky.	86	14	..	8	6
Cozatt, Ky.	88	14	..	8	6
Parksville, Ky.	89	14	..	8	6
Alum Springs, Ky.	93	14	..	8	6
Shelby City, Ky.	96	14	..	8	6
Baughman's Mill, Ky.	103	14	..	9	5
Stanford, Ky.	104	14	..	9	5
Rowland, Ky.	105	14	..	9	5
Haden, Ky.	107	14	..	9	5
Gilbert, Ky.	110	14	..	9	5

87 Affiant states that if said railroad company should continue to charge its present rates to the stations between Matson and Gilbert, inclusive, the abrupt jump from 6 cents at Lebanon to 12 cents at Matson, only one mile further distant, would amount to unjust discrimination in favor of Lebanon and against Matson and provoke complaint and litigation on the part of the citizens of Matson, and said railroad company would be compelled to grade up its rates to said stations so as to prevent such abrupt increases. Affiant is of the opinion that said railroad company would not be able to charge more than 7 cents per hundred pounds to the stations between Matson and Aliceton, inclusive, or more than 8 cents per hundred pounds to the stations between Brumfield and Shelby City inclusive, or more than 9 cents per hundred pounds to the stations between Baughman's Mill and Gilbert, inclusive. Affiant calls particular attention to the figures shown in the column headed amount of reduction indicated; that beginning at Gap in Knob, 16 miles from Louisville, said railroad company would be compelled to make reductions in its existing standard rates, which affiant believes and affirms to be just and reasonable rates, from a minimum of 1 cent to a maximum of 7 cents per hundred pounds.

Fifth. Affiant states that said railroad company, in making its rate to and from its country stations such as those at which said distilleries are located, has always endeavored to apply the same rate in both directions on both state and interstate shipments, and that the enforcement of said orders will compel said railroad company to charge on corn, rye, malt and barley, for instance, 6 cents per hundred pounds from Louisville to Gethsemane, while charging 10 cents per hundred pounds from Gethsemane to Louisville; or charging 6 cents from Louisville to Coon Hollow and 10 cents from Coon Hollow to Louisville; of charging 6 cents from Louisville to Chicago, Ky., and 10 cents from Chicago, Ky., to Louisville; of 6 cents from Louisville to Loretto and 11 cents from Loretto to Louisville; of charging 6 cents from Louisville to Lebanon and 12 cents from Lebanon to Louisville. Affiant believes and says that such
88 wide differences between the rates in one direction compared with the rates in the reverse direction would provoke complaint and litigation and said railroad company would inevitably be compelled to make reductions, both its state and interstate rates into Louisville, Covington and Newport corresponding with the reductions made by the rates fixed in said orders from Louisville, Covington and Newport.

Sixth. Affiant states that said railroad company in making its rates to and from its country stations has always endeavored to avoid any distinction between corn, rye, malt, barley, wheat, oats, and other kinds of grain, but to charge the same rates upon any kind of grain, and that the limitation of the distillers' rates on grain to corn, rye, malt and barley was merely because of the fact that those were the only kinds of grain used by said distillers, and it was therefore not necessary to include other kinds. Affiant says that no circumstance or condition exists to justify such widely varying rates on corn, rye, malt, and barley as compared with wheat, oats, and

other kinds of grain, and that said orders of said Railroad Commission, if enforced, will compel said railroad company to make reductions in its rates on wheat, oats, and other kinds of grain corresponding with the reductions made by said orders on corn, rye, malt and barley in order to avoid complaint and litigation by the shippers and receivers of wheat, oats and other kind of grain from and to the points specified in said orders and to and from all other points on said railroad company's lines in Kentucky.

Seventh. Affiant states that said railroad company has al-
89 ways endeavored to avoid making any difference between the rates upon carload and less than carload quantities of grain to and from its country stations; that the limiting of said distillers' rates to carload quantities of corn, rye, malt and barley was not an indispensable condition imposed by said railroad company, but resulted from the fact that the grain of said distilleries invariably moved in carload quantities; and affiant states that said orders of said Railroad Commission, if enforced, will require said railroad company to differentiate between carload and less than carload quantities of corn, rye, malt and barley, and thus create an unjust discrimination, as a result of which said railroad company will, in affiant's opinion, be compelled to establish carload and less than carload rates on all kinds of grain between all points in Kentucky.

Eighth. Affiant is familiar with the rates charged by said railroad company and by other railroad companies in the territory south of the Ohio and Potomac rivers and east of the Mississippi River in which lies the greater proportion of said railroad company's lines upon the articles embraced in the orders of said Railroad Commission, and that the rates therein fixed from and to points specified upon said articles and particularly on corn, rye, malt and barley are absurdly, unjustly and unreasonably low and are substantially lower in comparison with the rates charged elsewhere in said territory by said railroad company and by other railroad companies. Affiant states that said rates so fixed on corn, rye, malt and barley are materially lower than existing anywhere in said territory and
90 are materially lower than said Railroad Commission, to-wit, in 1906, declared to be just and reasonable rates for the transportation of such commodities in Kentucky for the same or similar distances upon the lines of the Louisville & Nashville Railroad Co., the Illinois Central Railroad Co., the Southern Railway, the Nashville, Chattanooga & St. Louis Railway Co., and the Cincinnati, New Orleans & Texas Pacific Railway Co.

Affiant further states that the rates so fixed by said Railroad Commission are, in his opinion absurdly, unjustly and unreasonably low in and of themselves, for the service performed, because they are materially less than the rates on the said articles charged by said railroad company in other parts of Kentucky, and said railroad company has not in the past and is not earning now more than a fair and reasonable return from its business in said State of Kentucky. Affiant further states that said rates are absurdly, unjustly and unreasonably low in and of themselves because they are materially less than would be charged for the same service between the

same points or between other points by any existing means of transportation. Affiant further says that said rates are absurdly, unjustly and unreasonably low in and of themselves, because they are measured by the special rates which were given to distillers, whereas said Railroad Commission has given said rates wide and unrestricted application.

Ninth. Affiant states that the rates embraced in said orders have been fixed in absolute disregard of the fact that the laws of both the State of Kentucky and the United States forbid said railroad
91 company to charge more for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distances, because the rate fixed in said orders on corn, rye, malt and barley, for instance, from Louisville to Lebanon, a distance of 67 miles is 6 cents whereas the rate from Louisville to Lofty, 61 miles over the same line in the same direction is 11 cents; to Dants, 53 miles 10 cents; to Willow Springs, 51 miles 10 cents; to New Haven, 45 miles, 10 cents; to Lyons, 43 miles 10 cents; to Nelsonville, 39 miles 9 cents and to Boston, 34 miles 9 cents per hundred pounds. Affiant knows of no circumstance or condition by reason of which said railroad company would be justified in charging upon said articles a less rate to any point of destination embraced in said order than to any intermediate station, and says that because of the laws aforesaid the railroad company would, therefore, be compelled to reduce the rates to all of its intermediate stations so as to be not higher than the rates fixed to the points of destination specified in said order, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Affiant says that the movement of the articles embraced in said orders upon said railroad company's lines in Kentucky is large in volume, and that the reductions in rates that would, in affiant's opinion, inevitably follow the enforcement of said orders would deprive said railroad company of many thousands of dollars of revenue annually, which it would otherwise receive on
92 basis of its existing standard rates which are just and reasonable in all respects, and that such loss will be irrecoverable because said reduced rates will not increase the volume of traffic moving over said railroad company's lines and, therefore, said reduction in rates and loss of revenue will be unaccompanied by any compensating benefits whatsoever to said railroad company, notwithstanding there has been in the last several years a heavy and constantly growing increase in the cost of the service required of said railroad company in transporting said articles.

C. B. COMPTON.

Subscribed and sworn to before me this 24th day of September, 1910.

My Commission expires January 24, 1914.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

93 The affidavit of D. M. Goodwyn, referred to in the foregoing order and filed by complainant on Sept. 26, 1910, is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of D. M. Goodwyn.

Filed by Complainant in Court, September 26, 1910.

The affiant, D. M. Goodwyn, states that he is fifty-four (54) years old; resides in Louisville, Kentucky, and has been for over nine years General Freight Agent of the Louisville & Nashville Railroad Company, complainant herein; that he has had more than thirty years' experience in the railroad business, having served the Louisville & Nashville Railroad Company nearly sixteen years during that period as chief clerk in the general freight office, as assistant general freight agent and as general freight agent.

94 Affiant states that he is familiar with the freight rates of said company, and during his employment with it has been directly connected with the making of said freight rates; that, in the performance of his duties, he has been required to investigate, analyze, keep in touch with the many and various conditions surrounding and affecting the freight traffic of the company, and the various cities and communities served by it.

Affiant states that he is familiar with the subject matter of this proceeding, and that, by reason of his experience and employment, he is qualified to testify concerning the same.

Affiant states that, for a long time prior to March 25, 1910, and as far back as 1874, said railroad company made reduced rates to the owners of distilleries located along its lines of railroad in the State of Kentucky for the transportation of their raw materials and supplies, said reduced rates being made for the promotion, encouragement and increase of the manufacture and shipment of whiskey via its lines of railroad; said rates were materially less than the rates charged upon the same articles by said railroad company between the same points of origin and destination, when intended for and devoted to uses other than the manufacture and shipment of whiskey; that said rates were made from season to season, or year to year, without any promise or obligation whatever made by said railroad company to continue said rates beyond the expiration of

the season or year; that until January 1, 1899, said special rates were made upon the same general basis, but upon that date
95 said railroad company, because of the depressed conditions surrounding the whiskey trade at that time, made still lower rates for said distillers on their grain; that until the passage, by Congress, of the so-called Hepburn Act, amending the Act to Regulate Commerce, said special rates on distillers' supplies were applied to both interstate and intrastate shipments; that shortly thereafter the Interstate Commerce Commission objected to the application of said special rates upon interstate traffic, whereupon said railroad company cancelled and withdrew said special rates as to all interstate traffic, and thereafter, until March 25, 1910, applied them only to intrastate traffic within the State of Kentucky.

Affiant states that thereupon and thereby the said railroad company was likely to be forced into the attitude of discriminating between intrastate and interstate traffic of the same character, to the same points of destination; that investigation developed that the conditions which had justified the making of said special rates in the beginning no longer existed; that the manufacture of whiskey at points along its line in the State of Kentucky, and shipments therefrom, had become firmly established as a large and profitable business; that whatever reasons had originally prevailed in the establishment of said special rates for the promotion and encouragement of said distilleries no longer existed; that said special rates were not a matter of contract between said distillers, or any of them, and said railroad company, but were made and extended to said distillers as the voluntary act of said railroad company, for the reasons aforesaid.

96 Affiant states that as the conditions which originally governed in the making of said voluntary concessions to said distillers had disappeared and no longer existed, the said rates had become unjustly and unreasonably low and a discrimination against those persons who were paying the higher or standard rates of said railroad company upon said articles, when intended for and devoted to uses other than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines, and upon its lines in the numerous other States wherein said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States where the circumstances are substantially similar.

Affiant states that there was not then, and has not been since, any complaint made against the application of said higher or standard rates on said articles when intended for and devoted to uses other than the manufacture and shipment of whiskey, but that, soon

after the cancellation and withdrawal of the special rates on distillers' supplies, various distillers, who have for many years, been beneficiaries thereof, filed a complaint with the Railroad Commission of Kentucky against the Louisville & Nashville Railroad Company, praying among other things, for an order requiring and com-
97 pelling said railroad company to restore said special rates. Affiant is informed and believes that no shipper, receiver or user of said articles for purposes other than the manufacture and shipment of whiskey was a party to said complaint or took any part in the prosecution thereof before said Railroad Commission of Kentucky.

Affiant states that on the 10th day of August, 1910, said Railroad Commission of Kentucky entered certain orders among other things declaring the rates then charged for the transportation of said articles (which said rates were the standard rates of the Louisville & Nashville Railroad Company, as hereinbefore described) to be extortionate, unjust and unreasonable, and forbidding said railroad company to charge, collect or receive for the transportation of said articles rates in excess of those which said railroad company had, prior to March 25, 1910, applied to said articles when intended for and used in the manufacture and shipment of whiskey. Affiant states that said orders were intended to and did have effect of fixing rates to be charged by said railroad company for the transportation between the points specified therein of the articles named, without reference to the uses to which said articles were to be applied by the consignees thereof; and of commanding and requiring said railroad company to apply the said rates to the shipments of said articles made by any and all persons, whether manufacturers and shippers of whiskey, or otherwise, and wholly without regard to the uses and purposes to which said articles were to be applied by the consignees thereof.

98 Affiant states that the principal ground for the complaint filed before said Railroad Commission of Kentucky against the Louisville & Nashville Railroad Company because of the cancellation and withdrawal of the special rates on distillers' supplies, was the cancellation and withdrawal of the special rates on distillers' grain, such as corn, rye, malt and barley; that said orders of said Railroad Commission of Kentucky are arbitrary, unreasonable and unjust, especially as applied to said grain:

First. Because they are intended to compel said railroad company to transport said grain at rates materially less than its said standard rates, as demonstrated by the following table:

From Louisville, Ky., to—	Distance.	Rates as per Kentucky Railroad commission's order.	L. & N. R. R. Co.'s standard rates.
Chapeze, Ky.	24 miles	5 cents	8 cents
Clermont, Ky.	25 "	5 "	8 "
Hobbs, Ky.	27 "	5 "	8 "
Lotus, Ky.	29 "	5 "	8 "
Deatsville, Ky.	31 "	5 "	8 "
Samuels, Ky.	33 "	5 "	8 "
Hunters, Ky.	36 "	5 "	8 "
Bourbon, Ky.	37 "	5 "	8 "
Nazareth, Ky.	37 "	5 "	8 "
Withrow, Ky.	38 "	5 "	8 "
Bardstown, Ky.	39 "	5 "	8 "
Early Times, Ky.	42 "	5 "	9 "
Greenbrier, Ky.	45 "	5 "	9 "
Athertonville, Ky.	44 "	5 "	9 "
Gethsemane, Ky.	48 "	6 "	10 "
New Hope, Ky.	50 "	6 "	10 "
Willow Springs, Ky.	51 "	6 "	10 "
Coon Hollow, Ky.	52 "	6 "	10 "
Dants, Ky.	53 "	6 "	10 "
Chicago, Ky.	55 "	6 "	10 "
Loretto, Ky.	57 "	6 "	11 "
St. Marys, Ky.	62 "	6 "	11 "
Lebanon, Ky.	67 "	6 "	12 "
Crab Orchard, Ky.	115 "	10 "	15 "
Calvary, Ky.	73 "	9 "	15 "
Campbellsville, Ky.	87 "	11 "	15 "
Eminence, Ky.	40 "	6 "	7 "
Jett, Ky.	71 "	6 "	7 "
Silver Springs, Ky.	88 "	8 "	9 "
Bloomfield, Ky.	57 "	7 "	9 "
Kellers, Ky.	135 "	10 "	13 "
Cynthiana, Ky.	133 "	10 "	13 "
Lair, Ky.	130 "	10 "	13 "
Haden, Ky.	107 "	10 "	13 "
Gilbert, Ky.	110 "	10 "	13 "
Lancaster, Ky.	113 "	10 "	13 "
Silver Creek, Ky.	129 "	10 "	12 "

Second. Because said rates on grain, sought to be established by said Kentucky Railroad Commission, are materially less than the rates prescribed in an order of the Kentucky Railroad Commission made in June, 1906, and as alleged by said Commission at that time to have been fair, just and reasonable; said schedule of rates of June, 1906, having been set aside by the Supreme Court of the United States as being beyond the authority of the Railroad Commission of Kentucky to establish (see table).

99

From Louisville, Ky., to—	Distance.	Rates as per Kentucky railroad commission's order of August 10, 1910.	Rates as per Kentucky railroad commission's order of June, 1906.
Chapeze, Ky.	24 miles	5 cents	6 cents
Clermont, Ky.	25 "	5 "	6 "
Hobbs, Ky.	27 "	5 "	6 "
Lotus, Ky.	29 "	5 "	6 "
Deatsville, Ky.	31 "	5 "	7 "
Samuels, Ky.	33 "	5 "	7 "
Hunters, Ky.	36 "	5 "	7 "
Bourbon, Ky.	37 "	5 "	7 "
Nazareth, Ky.	37 "	5 "	7 "
Withrow, Ky.	38 "	5 "	7 "
Bardstown, Ky.	39 "	5 "	7 "
Early Times, Ky.	42 "	5 "	8 "
Greenbrier, Ky.	45 "	5 "	8 "
Athertonville, Ky.	44 "	5 "	8 "
Gethsemane, Ky.	48 "	6 "	8 "
New Hope, Ky.	50 "	6 "	8 "
Willow Springs, Ky.	51 "	6 "	8 "
Coon Hollow, Ky.	52 "	6 "	8 "
Dants, Ky.	53 "	6 "	8 "
Chicago, Ky.	55 "	6 "	8 "
Loretto, Ky.	57 "	6 "	8 "
St. Marys, Ky.	62 "	6 "	9 "
Lebanon, Ky.	67 "	6 "	9 "
Crab Orchard, Ky.	115 "	10 "	12 "
Calvary, Ky.	73 "	9 "	10 "
Campbellsville, Ky.	87 "	11 "	11 "
Eminence, Ky.	40 "	6 "	7 "
Jett, Ky.	71 "	6 "	10 "
Silver Spring, Ky.	88 "	8 "	11 "
Bloomfield, Ky.	57 "	7 "	8 "
Kellers, Ky.	135 "	10 "	13 "
Cynthiana, Ky.	133 "	10 "	13 "
Lair, Ky.	130 "	10 "	12 "
Haden, Ky.	107 "	10 "	11 "
Gilbert, Ky.	110 "	10 "	11 "
Lancaster, Ky.	113 "	10 "	12 "
Silver Creek, Ky.	129 "	10 "	12 "

Said Adam T. Siler, one of the defendants in this cause, was a member of said Railroad Commission of Kentucky in June, 1906, making said order, which was set aside, as aforesaid, by the Supreme Court of the United States.

Third. Because said rates on grain, sought to be estab-
100 lished by said orders of said Railroad Commission of Kentucky, are materially lower than the rates on grain for similar distances in the State of Kentucky charged by lines other than the Louisville & Nashville Railroad Company; and materially lower than the rates on grain for similar distances charged in the States of Tennessee, Alabama and Mississippi, by lines other than the Louisville & Nashville Railroad Company, against which said higher rates in Kentucky, Tennessee, Alabama and Mississippi, charged by said lines other than the Louisville & Nashville Railroad Company there has been no protest or complaint, so far as this affiant is informed and believes.

Fourth. Because said rates on grain sought to be established by said orders of said Railroad Commission of Kentucky are as low as, and, in many cases lower than, the rates charged on grain in the States of Indiana and Ohio, where grain is produced in very large quantities, forming a considerable percentage of the tonnage of the railroads in said States, and where the density of population and of tonnage is materially greater than in the State of Kentucky.

Fifth. Because the said orders, in seeking to compel said railroad company to apply on said articles between the points specified therein, rates which are materially less than applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates, without distinction or discrimination, between all points on its lines in the State.

101 Sixth. Because the said orders seek to compel said railroad company to apply the said rates to the traffic in said articles for any and all persons shipping from and to the points specified, notwithstanding the fact that as between the said railroad company and the shippers, receivers and users of said articles for purposes other than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Seventh. Because the said orders, if enforced, will compel said railroad company to unjustly discriminate in favor of points on its lines in the State of Kentucky and against points on its lines in other States, or else to apply the said rates, without distinction or discrimination, between all points on its lines in all the States in which said railroad company operates, thus practically enabling said Railroad Commission of Kentucky to make the interstate rates of the Louisville & Nashville Railroad Company.

Eighth. Because said orders, if enforced, will compel said railroad company to charge less for a long haul than for a shorter haul over the same line in the same direction, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the further order of said Commission and the order of the Interstate Commerce Commission.

102 Ninth. Because said orders, if enforced, will compel said railroad company to accept in other States, as well as in the State of Kentucky, and upon interstate, as well as intrastate traffic, rates which are unusually, unjustly and unreasonably low in and of themselves, and relatively, and which will not yield the said railroad company fair and reasonable compensation for the service performed, and will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use in other States, as well as in the State of Kentucky, and upon interstate, as well as upon intrastate traffic.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income, in other

States, as well as in Kentucky, on traffic handled to and from points not occupied by the distilling interests, and in connection with the movement of traffic as to which there has been no complaint whatever about the rate; that said orders, if enforced, will result in the establishment of unreasonable, unfair, and unjust rates upon said railroad company's lines in Kentucky, as well as in other States.

D. M. GOODWYN.

Subscribed and sworn to before me, a Notary Public, in and for the County of Jefferson, State of Kentucky, this 23rd day of September, 1910.

[SEAL.]

G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

My Commission expires on the 24th day of January, 1914.

103 The affidavit of Defendant, Adam T. Siler, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of Defendant Adam T. Siler.

Filed by Defendants in Court September 26, 1910.

The affiant, A. T. Siler, states that he is a member of the Kentucky Railroad Commission, and as such is one of the defendants in this cause, and that he has been a member of said Commission for several years last past, and is now the chairman of said Commission. This affiant further states that the orders of said Commission complained of herein were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due

104 notice as to the time and place of hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and

that defendant being represented by counsel was permitted to fully cross-examine the witness introduced by the complainants. Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of
105 plaintiff herein to any appreciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which plaintiff is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample oportunity to test the validiy of said orders in the civil courts, and that it is his purpose and he believes that it is
106 the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and in-

tention to insist upon that construction of the statute. Affiant further states that the plaintiff herein did not by its answer filed to said complaint deny that the several amounts for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler, this — day of September, 1910.

My commission expires Feb. 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

107 The affidavit of Lawrence B. Finn, Defendant, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of Defendant Lawrence B. Finn.

Filed by Defendants in Court, September 26, 1910.

The affiant, Lawrence B. Finn, states that he is a member of the Kentucky Railroad Commission and as such is one of the defendants in this cause, and that he was a member of said Commission when the orders complained of herein were filed. This affiant further states that said orders of said Commission were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road, and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due notice as to the time and place of
108 hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and that defendant being represented by counsel was permitted to fully cross-examine the witnesses introduced by the complainants. Affiant further states that the uncontradicted evi-

dence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of the evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant, operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of plaintiff herein to any appre-
109 ciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which complainant is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample opportunity to test the validity of said orders in the civil courts,
110 and that it is his purpose and he believes that it is the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and intention to insist upon that construction of the statute. Affiant further states that the plaintiff herein did not by its answer filed to said complaint deny that the

several amounts for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

LAWRENCE B. FINN,
R. R. Com., First Ky. Dis.

Subscribed and sworn to before me by Lawrence B. Finn, this 26th day of September, 1910. My commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

111 The affidavit of W. A. Miller, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of W. A. Miller.

Filed by Defendants in Court, September 26, 1910.

Affiant, W. A. Miller, says that he is Vice-President of Wright & Taylor, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in
112 said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and from the distilleries located at said points sufficient in quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Affiant says that if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the

points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

W. A. MILLER.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by W. A. Miller, this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.] J. V. NORMAN,
Notary Public in and for Jefferson County, Kentucky.

113 The affidavit of R. H. Edelen, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of R. H. Edelen.

Filed by Defendants in Court, September 26, 1910.

Affiant, R. H. Edelen, says that he is President of the Mattingly & Moore Distillery Company, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in
114 said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and from the distilleries located at said points sufficient in

quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Affiant says that if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

R. H. EDELEN.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by R. H. Edelen this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.] J. V. NORMAN,
Notary Public in and for Jefferson County, Kentucky.

115 The Demurrer of defendants to whole Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Whole Bill.

Filed by Defendants in Court, September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

116 2. That said bill of complaint of the complainant is wholly without equity.

3. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

4. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAS. BREATHITT, *Att'y Gen'l;*
JNO. F. LOCKETT, *Ass't Att'y Gen'l;*
McCHORD, HINES & NORMAN,
Attorneys for Defendants.

Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My Commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. F. LOCKETT,
Of Counsel for Defendants.

117 The Demurrer of defendants to part of Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,

vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Part of Bill.

Filed by Defendants in Court September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to a Part of the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur to so much and such part of the
118 bill as seeks that these defendants may answer and set forth whether a certain order of the Kentucky Railroad Commission made on August 10, 1910, awarding reparation to the Greenbrier Distillery Company and certain other persons and companies on account of extortionate freight charges shall be put into effect and enforced, and to so much and such part of said bill as prays for an injunction restraining these defendants from putting said order into effect, and shows:

1. That it appears by the complainant's own showing by the said bill that it is not entitled to any relief on account of the matters set up in said part of said bill, and especially is not entitled to the said relief prayed for.

2. That said part of said bill is wholly without equity.

3. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said part of said bill.

Wherefore and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this Honorable Court whether they shall be compelled to make any answer to such part of said bill as is so demurred unto as aforesaid, these defendants being unable by reason of the fact that the bill intermingles its several complaints to more specifically set out the parts of the bill to which this demurrer relates.

JAMES BREATHITT,
Att'y Gen'l of Ky.;
JNO. F. LOCKETT,
Ass't Att'y Gen'l of Ky.;
McCHORD, HINES & NORMAN,
Counsel for Defendants.

119 Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

JNO. F. LOCKETT,
Of Counsel for Defendants.

120 On a day following, to wit: on the 3rd day of November, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:—

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, *November 3rd, A. D.* 1910.

Court Met Pursuant to Adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER et al., Defendants.

This cause coming on to be heard on the demurrers of the defendants to the bill of complain*ant* and the application of the complainant for an interlocutory injunction against the defendants, and it appearing to the court that notice of this hearing has been given for more than five days to the governor and to the attorney
121 general of the State of Kentucky, and to the defendants in this cause, and so admitted by counsel for both complainant and defendants in open court:

Came the complainant by Albert S. Brandeis and H. L. Stone, its attorneys, and defendants by McChord and Hines and John F.

Lockett, their attorneys, and the said John F. Lockett also appearing as assistant attorney general for the attorney general.

Whereupon, complainant by attorneys, tendered and offered to file an amended bill of complaint herein, which is now ordered filed, and on motion of defendants, consented to by complainant, the defendants are hereby allowed to amend their demurrers so as conform to the bill of complaint as amended, and same are hereby ordered filed.

Whereupon, the demurrers of defendants to the bill of complaint as amended, and the motion of complainant for an interlocutory injunction herein, were argued by counsel, and are now submitted, and the court not being fully advised, takes time.

On motion of parties, both complainant and defendants, they are given time until and including November 25th next, to prepare and file briefs herein.

122 Said Amended Bill of Complaint, referred to in the foregoing order and filed on the 3rd day of November A. D., 1910, is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

Louisville & Nashville Railroad Company, Complainant,
vs.
Adam T. Siler et al., Defendants.

Amended Bill of Complaint.

Filed in Court November 3, 1910.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, the Louisville & Nashville Railroad Company, brings this, its amended bill of complaint, against Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, constituting the Railroad Commission of the State of Kentucky, defendants, and thereupon states:

XVIII.

That, including the lines of railroad owned and operated by it, as stated in its original bill of complaint herein, it owned and operated on August 10, 1910, and now owns and operates the following lines of railroad, situated in fifty-seven (57) counties in the State of Kentucky, to-wit:

1-*a*	From—	To—		
L. & N.—Main stem	Louisville, Ky.	State Line, Ky.-Tenn.	139.91	
Lebanon Branch	Lebanon Jct., Ky.	Sinks, Ky.	107.28	
Cumberland Valley Division	Corbin, Ky.	State Line, Ky.-Tenn.	46.94	
*Cincinnati Division	Louisville, Ky.	State Line, Ky.-Ohio	109.63	
*Cincinnati Division	E. Louisville, Ky.	South Louisville, Ky.	4.15	
A. Street Connection	Transfer Jct., Ky.	A Street Jct., Ky.	.76	
Memphis Line	Memphis Jct., Ky.	State Line, Ky.-Tenn.	46.46	
†Henderson Division	State Line, Ky.-Tenn.	State Line, Ky.-Ind.	98.23	
Knoxville Division	Corbin, Ky.	State Line, Ky.-Tenn.	30.03	
Kentucky Division	Covington, Ky.	Corbin, Ky.	185.07	
Louisville & Atlantic Rd.	Versailles, Ky.	Beattyville Jct., Ky.	101.10	
				869.56
1-*b*				
Chesapeake & Nashville Branch	State Line, Ky.-Tenn.	Scottsville, Ky.	10.08	
Greensburg Branch	C. & O. Jct., Ky.	Greensburg, Ky.	30.90	
Bardstown & Springfield Branch	Bardstown Jct., Ky.	Springfield, Ky.	37.44	
Knoxville Division branches	Wilton Jct., Ky.	Lorena, Ky.	3.97	
	Saxton, Ky.	State Line, Ky.-Tenn.	3.19	
	Jellico, Tenn.-Ky.	Halsey, Ky.	8.11	
	Maxie, Ky.	Kensee, Ky.	1.78	
Cumberland Valley Division branches	Orby, Ky.	Harrison, Ky.	17.13	
	Wenrick, Ky.	Straight Creek, Ky.	2.01	
Middlesboro Rd.	Middlesboro, Ky.	State Line, Ky.-Tenn.	5.23	
	Stony Fort Jct., Ky.	Logmont, Ky.	6.08	
	Logmont, Ky.	Elwood, Ky.	2.87	
Clarksville & Princeton Branch	State Line, Ky.-Tenn.	Gracey, Ky.	23.17	
Cincinnati Division Branch	Louisville, Ky.	Pipe Line Ave., Ky.	3.46	
Lexington Branch	La Grange, Ky.	Lexington, Ky.	67.00	
	Shelbyville, Ky.	Christiansburg, Ky.	8.51	
Shelby Branch	Anchorage, Ky.	Shelbyville, Ky.	18.58	
Bloomfield Branch	Shelbyville, Ky.	Bloomfield, Ky.	26.72	
Kentucky Division Branch	Ft. Estill Jct., Ky.	Rowland, Ky.	30.47	
Morganfield Branch	Madisonville, Ky.	Providence, Ky.	16.10	

Louisville & Atlantic R. R.	Heidelburg, Ky.	Idamay, Ky.	3.00	
Frankfort & Cincinnati R'y	Frankfort, Ky.	Paris, Ky.	40.10	
				365.90
2				
Morganfield & Atlanta Rd.	Providence, Ky.	**Morganfield, Ky.**	25.33	
Maysville & Lexington R'y—N. Division	Maysville, Ky.	Paris, Ky.	49.48	
Maysville & Lexington R'y—Sou. Div.	Paris, Ky.	Lexington, Ky.	17.86	
Owensboro & Nashville R'y	Owensboro, Ky.	Adairville, Ky.	83.46	
Pine Mountain Rd. East	Yingling, Ky.	Chadman, Ky.	2.14	
	Savoy, Ky.	**Gatliff, Ky.**	18.60	
Pine Mountain Rd. West	Nevisdale, Ky.	Packard, Ky.	2.49	
‡Central Transfer R'y & Storage Co.	In city of Louisville, Ky.		.....	
Madisonville, Hartford & Eastern Rd.	Reinecke Jct., Ky.	Ellmitch, Ky.	55.49	
				254.85
3				
Glasgow R'y	Glasgow Jct., Ky.	Glasgow, Ky.	10.50	
Elkton & Guthrie Rd.	Elkton, Ky.	Guthrie, Ky.	10.92	
				21.42
4				
Southern R'y	State Line, Tenn.-Ky.	Fonde, Ky.	2.09	
Louisville & Interurban R'y	Pipe Line Ave., Ky.	Prospect, Ky.	7.70	
Cov. & Cinti. Elev. Rd. & Tfr. & Brg. Co.	State Line, Ky.-Ohio	Covington, Ky.	1.58	
Providence Coal Co.	Tracks at Providence, Ky.		.30	
L., H. & St. L. R'y	Tracks at Owensboro, Ky.		.26	
Chesapeake & Ohio R'y	Tracks at Lexington, Ky.		.20	
Lexington Union Station Co.	Tracks at Lexington, Ky.		.22	
Straight Creek Coal & Coke Co.	Straight Creek, Ky.	**Blanche, Ky.**	3.89	
				16.24
			Total	1,527.97

* Includes Newport & Cincinnati Bridge in Kentucky ..... 0.54 of a mile
† Includes Henderson Bridge in Kentucky ..... 0.47 of a mile
‡ 0.67 miles in length operated as side track; owned jointly with Southern Railway Company.

124 Complainant states that the average total mileage of the railroad lines owned and operated by it during the year ended June 30, 1910, in Kentucky and other States and on August 10, 1910, was and is now..... 4,590.55

XIX.

Complainant further states that by its charter granted by the Legislature of Kentucky, entitled "An Act to Charter Louisville & Nashville Railroad Company," approved March 5, 1850, and the amendments thereto, it was and is authorized and empowered to charge and collect, for the transportation of goods, merchandise, and property of any kind whatever on or over its railroad lines in Kentucky, any sum not exceeding the following rates, to-wit:

For every one hundred pounds transported over twenty miles and under fifty miles three and one-half ($3\frac{1}{2}$) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool rags, and other like light bulky articles, weighing not more than sixty-five (65) pounds to the cubic foot, not exceeding fifteen (15) per cent above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails are exempted from the rates established in its said

125 charter, and complainant's board of directors is thereby authorized to contract especially therefor. For the transportation of passengers complainant is authorized by its charter to charge not exceeding four (4) cents per mile for each passenger, with his baggage weighing not more than forty (40) pounds.

The said maximum rates, which complainant is authorized and empowered to charge and collect for its transportation services on and over its lines in Kentucky are set out, in part, in Section eighteen (18) of its said original charter from the Legislature of Kentucky, and, in so far as they are not set out in that section, complainant is authorized and empowered by and expressly referred to in that section to charge and collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged and collected by and on the railroad from Lexington to Frankfort, Kentucky, which maximum rates were on March 5, 1850, set out in Section Twenty (20) of the act of the Legislature of Kentucky, entitled "An act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, and said maximum rates so provided for in Section Twenty (20) of the last mentioned act referred to and made part of complainant's said original charter, were in full force and effect, and charged and collected, upon said Lexington & Frankfort Railroad at the date of the passage and approval of complainant's said original charter on March 5, 1850, and complainant's charter

authority, powers, grants, rights and privileges to charge

126 and collect said maximum rates for its transportation lines in Kentucky have been ever since and are now in full force and effect.

Complainant states that by reason of these provisions in its charter there was a valid contract made, which still subsists between the Commonwealth of Kentucky and complainant, whereby complainant was and is authorized and granted the right and privilege to charge and collect from its patrons, on and over the lines of railroad it owns and operates in Kentucky, rates for the transportation of goods, wares, merchandise, property and freight and passengers, respectively, not exceeding the maximum rates hereinabove set out and provided in its said original charter and the amendments thereto.

Complainant states that all the lines of railroad owned and operated by it, as set forth in Paragraph III of its original bill of complaint and Paragraph XVIII of this, its amended bill of complaint, were constructed and acquired by complain-t upon the faith of said contract embodied in the charter provisions aforesaid, which have never been repealed by any act, public or private, of the General Assembly of the Commonwealth of Kentucky.

The complainant states while it is true that by a resolution of its Board of Directors, adopted July 11, 1902, complainant duly accepted the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891, and the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto, a copy of which resolution was filed with the Secretary of the State of
127 Kentucky, and thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the Commonwealth of Kentucky became and is now no longer irrevocable or irrepealable, nevertheless, said contract remains intact and has never been revoked or repealed by any act of the Legislature of the State of Kentucky, and the obligation thereof was on August 10, 1910, the date of the making by the defendants of the orders herein complained of and is still unimpaired and in full force and effect and beyond the power of the defendants constituting the Railroad Commission of Kentucky to set aside, annul or impair in any manner.

Complainant states that the rates it had in force and effect on the commodities between the points described in its original bill, effective on and after March, 25, 1910, which defendants held to be extortionate, and prescribed the rates complained of in lieu thereof, were less than the said maximum rates it was and is allowed by its charter to charge and collect as legal, just and reasonable for the transportation services performed, or to be performed, and, therefore, said order of the defendants, constituting said Commission, is null and void, and operates to deprive complainant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Complainant further states that it has never charged or collected on any of the lines of railroad it owned or operated in Kentucky, for the transportation of freight, any rate or rates in excess
128 of the minimum rates prescribed, allowed and authorized by its charter as aforesaid.

The complainant further avers that the defendants claim that the Act of March 10, 1900, known as the McChord Act, confers upon them as the Railroad Commission of Kentucky power and authority to declare the rates of complainant for the transportation of freight on and over its lines in said State extortionate, although they do not exceed the maximum rates provided for in its charter, and notwithstanding its charter, in that respect, has not been repealed, and also power and authority to prescribe lower rates in lieu thereof, and to subject complainant and its officers, agents, and employés to criminal prosecution and heavy, repeated, and cumulative penalties for charging, collecting or receiving a greater or higher rate, toll or compensation for like services thereafter rendered than that made or fixed by the defendants, constituting said Commission.

The complainant states that said McChord Act so construed and the orders of August 10, 1910, made by the defendants, as such Commission, in pursuance thereof, and herein complained of, impair the obligation of the contract made and existing between complainant and the State of Kentucky, whereby complainant is entitled to charge, collect and receive rates on freight in said State not in excess of the maximum rates aforesaid upon the same kind of commodities, transported for the same distances stated in its charter, so long as said contract is not revoked and its said charter pro-
129 vision remains, as it does, unrepealed, by the Legislature of said State, which impairment is in violation of that provision of Sub-section one (1), Section ten (10), Article one (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

XX.

Cotaplainant further states that the maximum rates prescribed by the order made by the defendants, constituting the Railroad Commission of Kentucky, of August 10, 1910, herein complained of, upon corn, rye, malt, barley and other articles used in the manufacture and shipment of whiskey on and over complainant's lines from Louisville, Covington, and Newport, Kentucky, respectively, to the sixteen stations, respectively, named and set out in said order, are arbitrary, unjust, unreasonable, discriminatory and illegal because of the following facts, among other grounds, to-wit:

1. The defendants by their said order seek to compel the complainant to perpetuate and make permanent the special rates put in temporarily by complainant from season to season upon said commodities to be used as and for the purposes aforesaid from three points, respectively, to the sixteen points, respectively, named in said order, notwithstanding the conditions in consideration of which complainant therefore granted said exceptional rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

130 2. The defendants, by their said order, seek to compel complainant to apply the said low and unremunerative rates put in for said special purposes to the traffic in said commodities of any and all persons shipping from Louisville, Covington, and

Newport, respectively, to the points named in said order, respectively, thus giving to said special rates a much broader application than was ever voluntarily given thereto by complainant, notwithstanding the fact that as between complainant and the shippers, receivers and users of said articles of freight for other purposes than the manufacture and shipment of whiskey there was and is a complete absence of the conditions and considerations, which induced complainant to voluntarily grant said special rates in the beginning and afterward to continue them in effect from season to season.

3. The said special rates upon said commodities and articles from the three points, respectively, to the sixteen points, respectively, named in said order, are materially less than are applied thereto between other points on complainant's lines in Kentucky, and if enforced, would make an unjust discrimination between different sections of the State, or else compel the application of said special and low rates, without distinction or discrimination, to the transportation of said commodities and articles between all points on its lines in the State of Kentucky.

4. The enforcement of the rates prescribed in said order will bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points
131 in other States and transported between the same points in Kentucky, thus placing a burden on interstate commerce, or else to apply the said rates without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.

5. The said order, if enforced, will compel complainant to charge materially less rates in one direction than in the other direction between the same points, on both intrastate and interstate traffic of the same kind, or else to apply said specially low rates, without distinction or discrimination, in both directions between all points.

6. The said order, if enforced, will require complainant to charge less rates upon corn, rye, malt, and barley than upon wheat, oats, and other kinds of grain, whereas complainant has always endeavored to charge and collect the same rates upon all kinds of grain, or else complainant will be compelled to apply the rates specified in said order to all kinds of grain upon both intrastate and interstate shipments.

7. If enforced, said order will compel complainant to charge and collect less rates per 100 pounds upon carload quantities than less than carload quantities of grain, whereas complainant has always endeavored to charge and collect the same rate upon carload as upon less than carload quantities of grain or else complainant will be compelled to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

8. The enforcement of said order will compel complainant
132 to accept upon interstate as well as intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which will not yield to complainant a fair or reasonable compensation for the service performed, and will deprive complainant without due process of law of the fair and rea-

sonable return, to which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The enforcement of the rates fixed by said order would compel complainant to charge and receive a less rate or compensation for the transportation of property of like kind, both intrastate and interstate traffic, for a longer haul than for a shorter haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States, unless relieved therefrom by the further order of the Railroad Commission of said State, and the order of the Interstate Commerce Commission.

10. The enforcement of the rates prescribed by said order will inflict upon complainant a direct annual loss of revenue and income to at least the extent of the sums stated in its original bill of complaint, upon the transportation of both intrastate and interstate traffic in Kentucky, and a loss many times larger as the necessary result and consequence of being compelled to put into force and
133 effect the rates in accordance with said order on the commodities between the points named therein, and between other points on its lines in Kentucky, with no compensating benefits whatsoever, and in the face of the fact that there has been in the last few years a very heavy increase in the cost of labor, materials, supplies, and every other element or factor entering into the expenses of operating complainant's lines of railroad in, as well as out, of the State of Kentucky.

Wherefore, the complainant prays as in its original bill of complaint, and for all other relief to which it in equity may appear to be entitled.

ALBERT S. BRANDEIS,
WILLIAM G. DEARING,
HENRY L. STONE,
Attorneys for Complainant.

STATE OF KENTUCKY,
Jefferson County:

Personally appeared before me, G. W. B. Olmstead, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, A. R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville & Nashville Railroad Company, the complainant in the foregoing bill, and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

A. R. SMITH.

134 Subscribed and sworn to before me this 2nd day of November, A. D. 1910.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 24th day of January, A. D. 1914.

[SEAL.] G. W. B. OLMSTEAD.
Notary Public, Jefferson County, Ky.

135 Said Demurrer to whole Bill as Amended, referred to in the foregoing order and filed on the 3rd day of November, A. D. 1910, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Whole Bill as Amended.

Filed in Court November 3, 1910.

The joint and several demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, above named defendants, to the bill of complaint of Louisville & Nashville Railroad Company, the above named complainant, as amended by complainant's amended bill filed herein on the 3rd day of November, 1910.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same
136 are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

2. That said bill of complaint of the complainant is wholly without equity.

3. That complainant has an adequate remedy at law.

4. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

5. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and

things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAMES BREATHITT, *Att'y Gen'l.*
JOHN F. LOCKETT, JR.,
Ass't Att'y Gen'l.
McCHORD, HINES & NORMAN,
Attorneys for Defendants.

Adam T. Siler makes a solemn oath and says that he is one
137 of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 5th day of November, 1910.

MINNIE MURPHY,
Notary Public in and for —— County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

EDWARD W. HINES.

158 On a day following, to wit: on the 9th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures as follows, viz:—

MONDAY, *January* 9, 1911.

Court met pursuant to adjournment.

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in this case.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD CO., Complainant,
vs.
ADAM T. SILER et al., Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, the court files its written opinion herein.

Said opinion filed January 9, 1911, referred to in the foregoing order, is in words and figures as follows, viz:—

139 In the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The complainant brings its bill in equity against defendants as individuals, and also as officials composing the railroad commission of Kentucky. The complainant was organized as a corporation under a special charter granted by the State of Kentucky; it is invested with the usual powers of a steam railroad company, and is maintaining and operating a number of lines of railroad comprising a main stem and various divisions and branches within the State which are described in the bill by names and mileage. The complainant has its office and principal place of business in the city of Louisville; and the defendants are the duly qualified and acting members of the railroad commission mentioned, having their principal office in the city of Frankfort in the Eastern District of the State, of which they are all inhabitants.

Complaint is made that on August 10, 1910, the railroad commission upon petition of a number of shippers passed an order declaring certain rates then exacted by the railroad company for the transportation of certain commodities between point- named within the State were extortionate, unjust and unreasonable, forbidding their further exaction, fixing lower rates and declaring them to be just and reasonable; and further that the commission at the same times passes another order finding that the complaining parties had paid sums in excess of just and reasonable rates for transportation of such commodities between the points alluded to, and that
140 each was by said order awarded a stated sum of money representing such excess. Quite a number of grounds are stated in the bill against the validity of these orders. These grounds, so far as they need to be passed upon, are stated in the opinion; but it may be said in passing that the statute under which the orders were made is claimed to be violative alike of certain provisions of the Constitution of the State of Kentucky and of the United States. The complainant prayed among other things for an injunction to restrain defendants individually, and also jointly as the railroad commission, from continuing the orders of August 10th, from recommending or causing to be instituted any prosecution by indictment or otherwise against complainant or its officers, agents or employés, to recover any fine or penalty imposed by the statute or on account of complainant's failure or refusal to put the orders or either of them into force on any of its lines, from filing a certified copy of the order finding and awarding reparation in the office of the clerk of the circuit

court in any of the counties having jurisdiction or into or through which any of the lines or road are operated concerning which the award was made, or in the office of the clerk of the circuit court of any other county within the State; and that meantime and until a decision could be had upon complainant's motion for an injunction, a restraining order be granted immediately enjoining the acts in question; and that on final hearing the injunction as prayed be made perpetual, the orders be declared null and void and that a mandatory injunction be issued commanding defendants to recall and revoke each of the orders, and also that the statute under which the orders were made be declared and adjudged to be in violation alike of the Constitution of the State of Kentucky and of the United States.

On motion and a showing of irreparable injury, a restraining order was on September 7, 1910, granted by Judge Cochran in accordance with the prayer of bill, to continue until September 26th of that month, when motion for an interlocutory injunction would be heard; on the last named date certain affidavits were filed by
141 the parties respectively, and on the same date defendants filed two demurrers, one to the whole bill and the other to part of the bill, stating various grounds. But Judge Cochran for good reasons declined to sit further in the case, stating that he would certify this fact to Hon. Henry F. Severens, presiding Circuit Judge. Upon proceedings specially taken Circuit Judge Warrington was designated to sit in the case, and in accordance with the Act of Congress approved June 18, 1910 (U. S. Stat. 1910, part 1, Ch. 309, Sec. 17, p. 557) District Judges Sanford and Denison were by the circuit judge called to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in the cause. On November 3, 1910, the parties to the cause appeared by their respective counsel, and leave was given to complainant to file an amended bill of complaint, and to defendants to amend their demurrers to conform to the bill of complaint as amended. The cause was argued on that day and the printed record and briefs were filed on the 25th of the month.

By the amendment it is averred that at the date of the orders in dispute, complainant owned and was operating lines of railroad in fifty-seven counties of Kentucky, and that its "average total mileage of railroad lines then operated in that and other States was 4590.55 miles"; that the rates which the commission found to be extortionate on August 10, 1910, were less than the maximum charter rates which complainant was authorized to exact; that the new rates fixed by the commission were arbitrary, unreasonable and discriminatory for a number of reasons stated, which so far as necessary will be passed on in the opinion.

Before Warrington, Circuit Judge, and Sanford and Denison, District Judges.

Per CURIAM: In view of the character of some of the federal questions presented by the averments of the bill as amended and of the

good faith in which the questions are urged, it is scarcely nec-
142 essary to say, that jurisdiction of the cause is vested in this court through the presence of those questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & N. R. R. Co. 213 U. S. 175, 190. The nature of the federal questions made is for the most part like those relied on in that case, and they will be stated as we progress. The power of the railroad commission of Kentucky to adopt and enforce the orders in dispute, is denied. By Sec. 209 of the State constitution, adopted September 28, 1891, a commission was established to be known as the "Railroad Commission", comprising three commissioners, whose powers were to be:

"regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations and receive the same compensation as now conferred, prescribed and allowed by law to the existing railroad commissioners." (Russell's Stat. of Ky. 1909, p. 1622.)

March 10, 1900, the General Assembly of Kentucky passes a law known as the McChord Act, entitled:

"An act to prevent railroad companies or corporations owning and operating a line, or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions." (March 10, 1900, Acts c. 32, Sec. 820*a*; Russell's Stat. 1909, pp. 1303-4.)

The body of the act need not be set out, for it appears in 213 U. S. at 179, also 183 U. S. at 484 and 103 Fed. at 218. The rate order now in dispute was made by the commission in virtue of this act. As pointed out in the statement, the constitutional validity of the act is challenged under both the State and federal constitutions. The act has never been passed upon by the Court of Appeals of Kentucky; but it is claimed that certain other statutes which in parts at least were kindred to portions of the McChord Act have been passed upon by the Court of Appeals. We shall consider these later.

The McChord Act was, however, held to be violative of certain provisions of the State and federal constitutions in a decision rendered by Judge Evans shortly after the enactment of the
143 law. Louisville & N. R. R. Co. v. McChord, 103 Fed. 216. That suit was one of several brought by a number of railroad companies operating roads within the State, to enjoin the commission from carrying into effect any of the provisions of the act. Upon appeal directly to the Supreme Court, it was held that the suits and the orders made in them were premature and the decrees were reversed and the cases remanded with direction to sustain the demurrers and dismiss the bills. The constitutional validity of the McChord Act was not determined. McChord v. Louisville & Nashville

Rd. Co. 183 U. S. 483. Later the complainant in the present suit filed a bill in this court to enjoin the enforcement of a certain order made by the Railroad Commission providing maximum rates for the transporation of all commodities by the railroad company to and from all points within the State. The cause was by stipulation submitted to Judge Cochran, who followed the decision of Judge Evans, holding the McChord Act to be unconstitutional; upon direct appeal to the Supreme Court it was again found unnecessary to pass upon the validity of the act, the court holding that "under the statute the commission had no authority to make a general tariff," and the final decree of the Circuit Court was for that reason affirmed. Siler v. Louisville & Nashville R. R. Co., supra, 198.

We are thus brought to a consideration of the validity of the present orders of the commission. It appears by the bill that on May 30, 1910, a number of distilling companies located and engaged in Kentucky in the manufacture, storage and preparation for market and sale of whiskey and other distillery supplies and products, and in shipping the same to and from their respective plants, filed a joint petition as plaintiffs with the railroad commission against the present complainant, alleging that their respective plants were located upon lines and at certain named stations of the railroad which are specially set forth in the bill; that in order to
144 operate their distilleries it was necessary for each of the distilling companies to cause to be transported over the railroad lines from various points shown in an exhibit filed with the petition, certain commodities required in the manufacture and preparation of whiskey and other distillery products for the market; that complaint was made in the petition of certain rates which were being exacted for transportation of the commodities mentioned between stated points of origin and destination both within the State of Kentucky; and in connection with the rates so charged certain other rates were set forth for transportation of the same commodities between the same points, which had been charged prior to March 25, 1910; that the rates complained of were in excess of the former rates and were extortionate, unjust and unreasonable, while the former rates had been maintained for many years and were just and reasonable; and that the petitioners prayed that the commission would after due notice and investigation make and fix just and reasonable rates and not in excess of those charged prior to March 25, 1910. By a second paragraph the petitioners claimed reparation to the extent of the difference between the former rates and the existing rates, the amount claimed by each petitioner being specifically stated with a prayer accordingly.

It is further stated in the original bill—

"the evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D. 1910, this complainant did have in effect upon its lines of railroad from the points of origin aforesaid to said points of destination, rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points, and with a purpose to encourage the manufacture of

whiskey at said points on the lines of railroad of complainant, and it was shown by the evidence at said hearing, and it is a fact, that said rates (all of which were contained in the tariffs of complainant) did not apply to shipments of said supplies from the same points of origin to the same points of destination when said supplies were intended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs were, in fact, charged, collected, and received as aforesaid for like supplies when intended for distillery uses. * * * That at all such times, said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rate based upon the intended uses of the supplies was abolished, but the rates
145 made effective March 25, 1910, as aforesaid, were and are reasonable and just."

Plainly the issues before the commission involved the question whether the rates which had for years prior to March 25, 1910, been charged for the carriage of distillers' supplies and products within the State of Kentucky, should be restored, and whether the difference between those rates and the rates which had been put into effect on March 25, 1910, and thereafter exacted down to the filing of the petition before the railroad commission, was recoverable as reparation. Upon these issues and the evidence adduced, as well as the arguments and briefs of counsel for both sides, the commission on August 10, 1910, made the two orders. The recitals contained in these orders are alike so far as they relate to the filing of the written complaint and exhibits, to the transmission of certified copies thereof by mail to the railroad company, to a written communication from the chairman of the commission advising the railroad company of the general nature of the complaint and fixing a day for the hearing more than ten days thereafter for the time and place of hearing and the appearance of the parties by their counsel, to the fact of testimony being adduced and the hearings upon both testimony and arguments, including the filing of briefs, and following these in the first order this appears:

"The commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected, and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable and by charging said rates defendant is, and has been, guilty of extortion.

"It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is hereby forbidden to charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows (See table attached).

"The commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable."

"It is further ordered that this order be entered upon the records of this office, and a copy thereof attested by the Secretary of the Commission be furnished defendant."

The table of rates comprises three places of origin, viz. Covington, Newport and Louisville, Kentucky, and sixteen places of destination in that State. The rates are in cents per 100 pounds, upon
145 packages, barrels, bottles, etc., containing unnamed articles, while the articles that are named consist of corn, rye, malt or barley, and iron hoops. As we understand these rates, they are the same as the rates that are prior to March 25, 1910, charged for the carriage of distillers' supplies and products, but that they are by the order extended to all shippers of like packages and commodities between the points and along the lines named, without regard to the occupations of such shippers; whereas the rates put in force by the railroad company on and after March 25, 1910, were the same as those previously exacted of shippers between said points on said lines who were not engaged as distillers. In other words, the uniform standard of rates as fixed by the railroad company on March 25, 1910, was that previously charged to non-distillers, while the uniform standard fixed on August 10, 1910, by the railroad commission was the one existing prior to March 25, 1910, in favor only of distillers.

For reasons stated later it will not be necessary or proper to pass upon the other order of the commission.

The first objection to the rate order is that the statute in virtue of which it was made, in terms confers judicial power upon the Commission in violation of Secs. 27, 28, 109 and 135 of the State constitution. The first two of these sections provide for the distribution of the powers of government, legislative, executive and judicial, and forbid persons in one of these departments from exercising any power belonging to either of the others. By Sec. 109, the judicial power, both as to matters of law and equity, are vested in the senate when sitting as a court of impeachment, the Court of Appeals, and "the courts established by this constitution"; and by Sec. 135: "No courts, save those provided for in this constitution, shall be established."

As regards the question of rates, it is made the duty of the commission by the McChord Act upon complaint made or information received or reason to believe, that a railroad company is exacting "extortionate freight or passenger rates * * * to hear
147 and determine the matter as speedily as possible." The act requires the commission to give the company complained of not less than ten days' notice by letter mailed to an officer or employé stating the time and place of hearing, the nature of the complaint or matter to be investigated, and "to hear such statements, arguments or evidence offered by the parties as the commission may deem relevant." The act further provides that should the commission determine that the company is or has been "guilty of extortion" the commission "shall make and fix a just and reasonable rate," which the company may exact "for like services thereafter rendered." The rates so fixed

"shall be entered and be an order upon the record book and signed by the commission and a copy mailed to an officer or employé of the company affected. This rate shall be in force and effect at the expiration of ten days thereafter, and may be revoked and modified by an order likewise entered of record."

The contention is that the words employed in clothing the commission with authority clearly indicate a design to invest the commission with judicial power. It is clear that the rate-making power is vested, and that this is legislative in character. But it is said that the exercise of this power is dependent upon the duty "to hear and determine" whether the corporation "is or has been guilty of extortion"; and that this duty can not be performed without exercising judicial power.

Before the McChord act was passed, the General Assembly of Kentucky by Sec. 816 had defined the exaction by any railroad company of "more than a just and reasonable rate of toll and compensation for the transportation of passengers and freight" as "extortion," and had by Sec. 819 penalized such exaction as an offense. But a judgment and verdict of conviction under an indictment charging such offense was reversed in the case of Louisville & Nashville Railroad Co. v. Commonwealth, 99 Ky. 132, because the statute leaves "uncertain what shall be deemed a just and reasonable rate of toll and compensation" (136). Further, in the course of the opinion it was said (139, 140):

145 "No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by snippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury."

Apparently the difficulty encountered in that case was sought to be remedied by the McChord Act; for the very mode prescribed by the McChord Act for the exercise of the rate-making power was calculated to furnish the commission with the facts necessary to ascertain what a just and reasonable rate would be and also to put to the test the reasonableness or not of the existing rate. It is hardly conceivable in a contested case that the mind could be prepared to resolve the question of "extortion" or "extortionate rate," without obtaining and considering facts tending to show what would be a fair compensation for the service in issue; and those very facts would inevitably establish a standard for at once fixing a reasonable rate to be charged for the service and testing the character of the existing rate. The circumstance then that these two results must necessarily be reached in the manner pointed out is one that ordinarily attends the exercise of legislative power.

It would therefore seem that the true intendment of the statute respecting rates was to bestow legislative power, rather than judicial power; and that the legislative power given to fix a just and reasonable rate to be enforced in the place and stead of the unreason-

able rate, necessarily embraced as part of the legislative power itself the right to find the fact of unreasonableness of the existing rate. If this latter right cannot be included in the grant of the legislative power so vested, without violating the provisions of the State constitution concerning judicial power, it is difficult to see how any rate-making power at all could be granted. We cannot believe that the judicial power which was designed to be alone vested in the courts mentioned in those provisions, was intended to prevent either the legislative department or the railroad commission from investigating into and finding facts which are but the necessary and familiar incidents and conditions to right legislation.

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In reaching this conclusion we do not overlook the particular words used or their sequence, as set forth in the McChord Act. Even if Sec. 816 of the Kentucky Statutes did not survive the decision in Louisville & Nashville Railroad Co. v. Commonwealth, before cited, in the sense as there stated (140) "the statute may be invoked as merely declaratory of the common law" respecting the legislative meaning intended to be attached to the word "extortion" in its relation to railroad rates—that is, that any change of "more than a just and reasonable rate" was "extortion"—still one of the accepted meanings of the word extortion is to overcharge; and the word could not have been used in any other sense in the McChord Act, because the penalties embraced by that statute are not inflicted for practicing extortion through exaction of the old rates, but for exacting "a greater or higher rate, toll or compensation, for like service thereafter rendered than that made and fixed by said commission." The established common law meaning of reasonable rates and inhibition of unreasonable rates, must then have been in the minds of the law makers when using the phrases "fix a just and reasonable rate for freight or passengers" and "guilty of extortion." It should be noted that in Siler v. Louisville & Nashville R. R. Co. (213 U. S. 175) Justice Peckham did not seem to observe any vice in the use of the word "extortion." He said (197):

"The statute, it will be remembered, gives no power to the commission to fix rates, unless it has already determined that the rate complained of, or which it has investigated upon its own information, are extortionate after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate there can be no fixing of rates in that particular."

That this railroad commission was not exercising judicial power within the inhibited sense of the State constitution is shown we think by the decision of the Supreme Court in Prentis v. Atlantic Coast Line, 211 U. S. 210. The suits there involved were brought to enjoin the Virginia State Corporation Commission from publishing or enforcing its order fixing passenger rates to be charged on railroads operating in the State of Virginia. One of the grounds averred was that the rates were confiscatory. The commission was created by the State constitution and its powers were defined by that instrument and certain statutes passed in pursuance of it. It was invested with legislative, judicial and ex-

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ecutive powers. It was contended that the proceedings before the commission were proceedings in a court of the State which the federal courts were by Rev. Stat. Sec. 70 forbidden to enjoin, and that the decision of the commission made the legality of the rates res adjudicata. The contentions made under the demurrers and pleas necessarily put to the test the nature of the power the commission was exercising when issuing the orders, receiving and considering the evidence offered and finally fixing the disputed passenger rates. Speaking for the court in respect of these proceedings Mr. Justice Holmes said (226):

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ."

Again (227):

"And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

We do not fail to observe the fact that the Virginia Commission does not seem expressly to have been required as the Kentucky Commission is, to find the existence of extortionate rates as a condition to the right to fix and supplant them by new ones. But apart from the practical necessity for the Virginia Commission to look into and consider the existing rates, no perceivable distinc-
151 tion is to be found between the nature of the power exercised at the hearing and investigation into evidence of facts upon which the new rates must of necessity be based, and that of the power to pass upon the question of extortionate rates then existing. All such matters are but preliminary and inducive to the exercise of the main power—the legislative rate-making power—and are as certainly mere incidents as are any other facts leading up to the making of the legislative rate; for it must constantly be borne in mind that everything found in such investigation is in effect but collateral to the new rule which is thereafter to be formulated and applied.

This of course suggests and we feel keenly the force of the statement made by the late Justice Brewer in Interstate Commerce Commission v. Railway Co. 167 U. S. 479, 499:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

It is to be noticed that the question with which the learned Justice was then confronted was whether the Interstate Commerce Commission was possessed of the rate-making power. He was not considering a question like the one we are now endeavoring to solve. He was dealing with a claim that the rate-making power was to be implied from other powers with which the commission was expressly clothed. It might well have been that an order of the federal commission finding that any given rates were unreasonable and ordering the railroad company to cease and desist from further exacting such rates, which order would become prima facie evidence of the fact of unreasonableness in any proceeding brought in a court to enforce it, was judicial in its nature; but if we rightly interpret the decision in Prentis v. Atlantic Coast Line, we are unable to see why a finding of the same character respecting particular rates made by a commission having express power to fix and with purpose to fix new and reasonable rates for future enforcement and operation, should not be regarded as merged in the new rule
152 and treated as part of the legislative power exercised in adopting the rule. Southern Pac. Co. v. Bartine, 170 Fed. 725, 775. Indeed, Justice Brewer must have had in mind when using the language before quoted, a principal similar to that expressed in Prentis v. Atlantic Coast Line, for at an earlier stage of his opinion in Interstate Com. Commission v. Ry. Co. he said (494):

"Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable."

While it is true as before stated that the Kentucky Court of Appeals has not passed upon the question now under consideration, yet it has decided one or two questions which are so far kindred as in some degree to disclose that court's views of the powers of the commission. Louisville & Nashville Railroad Co. v. Commonwealth, 106 Ky., 633, decided less than a year before the passage of the McChord Act, was an appeal by the railroad company from a judgment of conviction under an indictment for violating the long and short haul provision of the statute of the State. The statute was enacted in pursuance of Sec. 218 of the State constitution, which forbids a railroad company to charge greater compensation for transporting passengers or property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; subject however to a proviso that upon application to the railroad commission the carrier may after an investigation by the commission be authorized to charge less for longer than for shorter distances, and the commission may from time to time prescribe the extent to which such carrier may be relieved

from the operation of the section. To carry this into effect, the statute was enacted making a violation of a provision similar to one contained in the section an offense and imposing a fine of not less than $100 nor more than $300, to be recoverable by indictment in a named circuit court. The matter in controversy con-
153 cerned the transportation of coal, the company charging a greater sum for a shorter distance than it charged for longer distances. The company justified the difference in rates on the ground that it was necessitated by competition. The matter had pursuant to the statute been submitted to the railroad commission, and after investigation had upon notice and hearing that body made an order in writing "declining to exonerate the company from the operation of the provisions" of the statute, and thereafter at its suggestion appellant was indicted, found guilty and fined. In the course of the opinion of the court it was said (683):

"To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the community. . . . It was the aim of the Constitution to require the railroads in the State to treat all localities fairly and with equality; but, as differences of condition ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a shorter than for a long haul under like circumstances and conditions." . . .

And again (640):

"The power to determine this matter must be vested somewhere, and, the constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant."

It is true that no new rates were in that case fixed by the commission; but since the constitution and statute forbade exaction of the charges if the transportation in both instances was furnished "under substantially similar circumstances and conditions," the commission necessarily passed upon that question when adopting its order or refusal as certainly as it would have decided it if the order had been to exonerate. The inevitable effect of its conclusion was that the company's rates were unreasonable. In principal nothing more than this respecting the exercise of judicial power was done in the present case. The case was taken to the Supreme Court of the United States (Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 515), and that tribunal in spite of the existing
154 federal rule respecting long and short hauls, felt itself bound to accept the meaning of the State enactment as construed by the State court; and passing upon the federal questions presented affirmed the Court of Appeals.

Still another order of the railroad commission was upheld by the Court of Appeals in Commonwealth v. Louisville & Nashville Railroad Co. 120 Ky. 91. The action was one to compel the railroad company through mandatory process to furnish greater facilities

for the transportation of passengers and freight between points named in the State. It appeared that a proceeding was begun before the railroad commission against the railroad company, and upon due notice a hearing was had by the commission upon evidence. The commission decided that the public had a right to the use of "local passenger and freight train service over the railroad from Shelbyville to Christiansburg as demanded." The company refused to comply with the commission's order. One of the defenses was that the expense of compliance would entail upon the railroad company a heavy and continuous loss. Under certain statutory provisions railroad companies were required to run at least one passenger train each way on every day of the year, Sundays excepted. It was said in the opinion (104):

"The power to regulate the relative rights and duties of the railroads and the public in this State has, in large measure, been delegated by the Legislature to the Railroad Commission, and the provisions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore the recommendation made by them should have been obeyed by the railroad companies, but, they having failed to do so, appellant could but resort to the courts for relief."

See also Pennington v. Wolfolk, 79 Ky. 13, which sanctioned the vesting of power not judicial in the county court. That was done under an earlier constitution, but apparently not differing materially from the present one touching distribution of powers.

It is not disputed that the rate-making power is legislative in character; McChord v. Louisville & Nashville Rd. Co. before cited (183 U. S. 483, 495), Prentis v. Atlantic Coast Line, before
155 cited (211 U. S. 210, 226), Louisville & Nashville Rd. Co. v. Interstate Commerce Commission, decided April 10, 1910, by the Circuit Judges of the Sixth Circuit, Judge Severens announcing the opinion, to be reported; nor that the power may be delegated; Louisville & Nashville Rd. v. Interstate Commerce Commission, supra; Atlantic Coast Line v. N. C. Corp. Com. 206 U. S. 1, 19; Vil. of Saratoga Spgs. v. Saratoga G. Co. 191 N. Y. 123, 132 to 140, presenting a review of New York and federal decisions concerning doctrine of delegated authority, and 140 to 146 as to delegated power to fix rates.

We are therefore constrained to hold that the McChord Act is not violative of the judicial clauses of the Constitution of the State of Kentucky.

Another objection made to the constitutional validity of the McChord Act is that neither that act nor any other contains a provision for appeal to any court from a final order of the commission declaring an existing rate extortionate. This objection may be considered in connection with a still further one that is made on account of the penalties prescribed by this act. Both of these objections are in terms founded upon averments of the bill as amended

and claims urged in argument, that the absence of the right of appeal and the severity of the penalties imposed are alike violative of the due process and equal protection clauses of Sec. 1 of the Fourteenth Amendment.

As regards the claim that the constitutional guaranty of due process is violated by the rate order, the inquiry is whether the bill and affidavits show that complainant would through enforcement of the new rates be deprived of property. No averment is made either in terms or effect that the new rates would not yield a profit to the carrier, much less that its entire business would not do so. In the absence of a showing that property is taken the protection of this guaranty can be invoked. What may be a reasonable rate or return, as a matter of legal policy having due regard to encouraging the investment of capital in railroad enterprises, is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question. The law makers dealing with the legislative problem might think that in successful business years, a maximum return for example of 10% upon the investment would be reasonable; the courts dealing with the judicial problem are affected by locality and attending risks and circumstances involved in the particular case, and apparently insist only upon a maximum return to the owner of property devoted to public use which will be reasonable (say for example 6%) upon the properly computed investment. An illustration of this rule may be found in the announcement made by Justice Peckham in Willcox v. Consolidated Gas Co. 212 U. S. 19, 20;

"There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of 6 per cent upon the fair value of its property actually used in its business of supplying gas."

In City of Owensboro v. Cumberland Telephone & Telegraph Co. 171 Fed. (C. C. A. 6) 739, it was said by the present Mr. Justice Lurton respecting certain rates in dispute (747): "it is plain that the rates of such a company may not be reduced to a point below a rate which will pay operating expenses, maintain the plant, and return a fair profit upon the capital actually invested."

It is to be observed of the decisions in those cases that the justices were speaking of the entire property and earnings of the companies involved. But there seems to be a distinction made between cases "in which a public service is distinctly intended and rendered," and cases "in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use." Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 93. Thus, as respects the former class, in Minneapolis & St

Louis Rd. v. Minnesota, 186 U. S. 257, where certain coal
157 rates as fixed by a State railroad commission were involved and one of the questions was "whether the tariff fixed by the commission is wholly inadequate and not compensatory," Mr. Justice Brown said (267):

"While we have never decided that the Commission may compel such reductions, we do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

See also San Diego Land Company v. National City, 174 U. S. 739, 754.

There is then manifest room for vagueness and ambiguity in employing a word like "unreasonable" to characterize a rate. What might be regarded by a carrier as unreasonable, might be considered by a court as just and reasonable.

Now, turning to the bill and affidavits in the present case, we find general averments that the new rates are unreasonable and absurdly low, etc. But the bill does not clearly tender an issue that can be said to involve confiscatory rates; and complainant's counsel state in their brief that complainant is not bound in this case to allege or prove that the new rates are confiscatory, and upon the oral argument the same counsel expressly disclaimed a purpose to rely upon any contention that the new rates are confiscatory. This concession we think was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of non-distillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates; nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property. In view therefore of the bill and the disclaimer of counsel, we think that argumentative statements like those contained in the form of affidavits should be for the purposes of this preliminary injunction disregarded. The result is that the rates in dispute must so far at
158 least as they are applicable to traffic originating and carried wholly within the State, be treated at this stage of the case as not unreasonable in the sense of being confiscatory, but on the contrary as just and reasonable, and consequently as within the power of the commission.

The issue, then, if any can be said to arise on this branch of the case under the due process clause, is not presented through averment of facts but by argument based on the legislative failure, through the McChord Act or other statute, to provide for a judicial review of a rate-making order. It must be borne in mind, however, that the McChord act in terms provides for notice to the railroad company and a hearing, before any rate-making order can be made; and that complainant was notified of the complaint and given opportunity to be heard upon it and was in fact heard both

by evidence and argument before the order was adopted; and, moreover, that the act further provides that no such order shall take effect until a copy of it is mailed to a representative of the railroad company and until the expiration of ten days thereafter. Was it necessary to provide both of the remedies mentioned, or at least the one for judicial review after the passage of a rate-making order, to avoid violation of the guaranty of due process?

In Cin., N. O. & Texas Pac. R. R. *v.* The Commonwealth, 81 Ky. 492, complaint was made against an order of the railroad commission of Kentucky equalizing and increasing taxes laid upon railroad property. The companies were required through specified officers to make annual return under oath to the auditor of public accounts, of the mileage and average value per mile of the railroads, etc. Lack of due process was urged on the theory that there was no provision for notice and hearing before the order was made, or for revising or reviewing the order after it was made; it was not that the railroad companies did not have actual notice or that they were not in truth heard, or even that the valuation placed was too high (pp. 498, 502, 504, 505). After speaking of the term "due process of law" (509), Judge Pryor in announcing the opinion of the
159 court, said of the commission (512):

"The time and place of the meeting having been fixed by law, is notice to all, and if the reports of the chief officers of these corporations are to be regarded as an assessment and the commissioners a board of review, the act provides that they shall assemble at the Auditor's office in Frankfort, on the first day of September in each year, for the purpose of fixing valuations, and with that view are required to examine the reports made by the officers of the roads. This is notice to the companies, and to require actual notice to every one interested, if this board has supervisory power over all property in the State, would be altogether impracticable; nor will it answer to say that because there are only a few lines of railroad within the State, that actual notice could be readily given, for the courts would then be determining the constitutionality of the act by the extent of their supervisory power.

As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were, in fact, heard before the board passing on the question of valuation."

The decision was affirmed in Kentucky Railroad Tax Cases, 115 U. S. 321. Justice Matthews, speaking for the court and of the annual return above mentioned, said (333):

"This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert."

The learned justice at a later portion of the opinion (335) disposed of a claim that there was no security against arbitrary action of the commission, by stating that the possibility of such a result was but the necessary imperfection of all human institutions which

admits of no remedy. He also alluded to the fact that the tax had ultimately to be enforced by judicial proceedings. These decisions met with approval in San Diego Land Co. v. National City, 174 U. S. 739, upon grounds which we regard as controlling. The decision in the San Diego case involved the validity of constitutional, statutory and municipal provisions, for the regulation of water rates. One ground of objection was that those provisions did not furnish due process of law. One thing to be observed of the relevancy of the decision to the present case, is the comment there made upon decisions involving railroad rate-making power. After distinguishing the case of Chicago, Milwaukee, etc. Railway v. Minnesota, 134 U. S. 418, on the grounds that the Supreme
160 Court of Minnesota had held that the State statute in question made the action of the commission final and conclusive as to railroad rates and that the railroad companies were not at liberty in any form or at any time to question them (748), Mr. Justice Harlan, in delivering the opinion of the court and speaking of the necessity of notice to appellant before fixing the water rates, said (752):

"Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the first day of July thereafter. It was made by statute the duty of the appellee at least thirty days prior to the 15th day of January in each year to obtain from the appellant a detailed statement showing the names of water rate payers, the amount paid by each during the preceding year, and 'all revenue derived from all sources,' and the 'expenditures made for supplying water during said time.' It was the right and duty of appellant in January of each *month* (year) to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance. . . . Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to receive the statement referred to in the statute, or to have duly considered it and given it proper weight in determining rates."

Allusion to the Kentucky Railroad Tax Cases, supra, follows, and then the learned Justice proceeds (753):

"There is no ground to say that the appellant did not in fact have or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. Those officers may not have been present at the final meeting of the city board when the ordinance complained of was passed."

In view of the provisions made by the McChord act for notice and hearing and the actual hearing and trial had upon evidence and argument in the instant case, we think it falls fairly within the decisions in the Kentucky Railroad Tax Cases and the San Diego

case. It can make no difference that the order so made upon notice and trial was final. As said by Justice Shiras respecting an order of this very commission in Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 515:

"Finality is a characteristic of the judgment of all tribunals unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of land taken for public use or to assess damages to them, whose findings are deemed final."

161 Hence the present case does not fall within the ban of those decisions which deal with the statutes or with orders of subordinate bodies denying both notice and hearing, or with rates either admittedly or manifestly confiscatory.

As regards the penalties fixed by the McChord act, the most that can be claimed is that through their excessive character the officers and agents of complainant and also its property, would be imperiled by resort to judicial proceedings for the purpose of contesting the validity of the order fixing new rates. It is true that these penalties are severe. The provision is:

"And should said railroad company or corporation, or any officer, agent or employé thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars, no- more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars no- more than two thousand dollars, and for the third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars."

It is claimed in behalf of the commission that under certain decisions of the Court of Appeals there can be but one offense and one penalty of $1,000 for that offense; but on behalf of complainant these decisions are sought to be distinguished on the ground that the statutes there involved related only to a single person or company, while here the act relates not only to the carrier but to each of its officers, agents or employés, in the sense that each could be prosecuted for committing the first, second, third and subsequent offences. It is also urged by the commission that the penalties clause could be held void and the rest of the act valid. Further, the commission has presented affidavits disavowing any purpose to try to enforce the order through the penalties at least until the validity of the order has been passed upon in a civil suit. It would seem that an order fixing just rates could be enforced in Kentucky by civil action. Commonwealth v. Louisville & Nashville R. R. 120 Ky. 91; Sec. 273 of the Civil Code of Kentucky.

162 If then the order fixing new rates is within the power of the commission, a court cannot rightfully pass upon the wisdom of the penalties or the right to impose them. The question

comes to be, whether the railroad company is entitled to complaint of the amount of the fines, where it cannot aver and maintain that the rates to be violated are confiscatory. Surely this case is not like that of Ex parte Young, 209 U. S. 123. There the charge was that the rates were confiscatory, and the very drastic nature of the penalties, involving imprisonment, was calculated to deter the representatives of the railroad companies from attempting by judicial proceedings to protect the property against confiscation. In the course of the opinion, Justice Peckham said (147):

"In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested in the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

What we have said in respect of due process concerning new rates and the effect of the penalties, applies in large measure to the claim respecting the additional guaranty of equal protection of the laws. If the rates in dispute are reasonable in the sense before pointed out, the complainant is manifestly accorded both by the order and the statute the same rights and privileges that are rightfully granted to every other railroad carrier. This is equally true as to the penalties. It is only when a particular person or class of persons (including corporations) is denied equal privileges in comparison with those extended to others similarly situated, that the equal protection guaranteed by the Fourteenth Amendment applies. It can not be necessary to comment upon the class of well known decisions,
163 which recognize and declare this rule. We however cite Stone v. Farmers Loan & Trust Co. 116 U. S. 307, 335; Louisville & Nashville R. R. Co. v. Melton 218 U. S. 36, 52; Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, Admr. (U. S. Supreme Court), decided December 10, 1910, not yet reported.

Complainant urges that its own rate-making power and its maximum rates were fixed by a special charter granted by the State prior to the date of the present constitution and are so far contractual as to prevent either the State or its commission from interfering with the company's rights in this regard. The claim is that the railroad's rates which were supplanted by the commission's rates were lower than those authorized to be exacted by the charter, and that the supplanted rates cannot therefore be said to be unreasonable or the new rates reasonable. The contention of course is that the order of the commission impairs the obligation of the

charter contract within the meaning of the inhibiting clause in that respect of the Federal Constitution.

It is provided by Sec. 3 of the Kentucky Bill of Rights that "every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment;" by Sec. 59 of the State constitution the General Assembly is forbidden to pass a local or special act giving to "any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes;" and by Sec. 190:

"No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this constitution."

It is averred in the bill that by a resolution of its board of directors adopted July 11, 1902, complainant accepted the provisions of the present constitution, and also the provisions of Chap. 32 of the Kentucky statute enacted April 5, 1893. That chapter applies to private corporations, including railroad companies and the railroad commission. The first article of the chapter relates to "General Provisions" and includes Sec. 573:

161 The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. . . . ."

Sec. 816, to which we have alluded as having been involved in the decision of Louisville & Nashville R. R. Co. v. Commonwealth (99 Ky. 132), was embraced in Art. 5, Tit. Railroads of Chap. 32; and nearly two years prior to the acceptance by complainant of the constitution the McChord act was passed. Even if complainant's right to maintain its charter rates was not repealed by Sec. 573 in connection with 816, it is clear that such right was repealed through enactment of the McChord law and complainant's subsequent acceptance of the provisions of the constitution. It can not be either that complainant's charter rates or its rate-making power could survive and remain paramount to the rate-making power created by the McChord act; the absolute inconsistency of such powers is apparent. Further, it is stated in the bill "that the contract between the complainant . . . and the Commonwealth of Kentucky became and is no longer irrevocable or irrepealable;" but it is averred that the contract remains intact and has never been repealed or revoked by any act of the legislature, and the obligation thereof at the date of making the order in question was still in full force and effect. The argument in substance is that there has been no express repeal and that none can be implied. But we think a complete answer to all this is to be found in the decision announced by Mr. Justice White in Mo. Pac Ry. Co v. Kansas, 216 U. S. 262. It was claimed in that case that the railroad commission of Kansas could not by

order require the company to run trains over the portion of its line which was maintained in the State of Kansas, because of its charter provision vesting in it the right to determine the time and manner of operating such trains. One of the reasons assigned was that "as the legislature had not expressly amended or repealed the
165 right, such a result should not be made to flow from the section conferring powers upon the commission, as repeals by implication were not favored" (272). After referring to certain propositions stated and of a purpose to consider them, the learned Chief Justice said (274):

"Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the State to repeal, alter or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act had impaired a contract without by the same token declaring that such act has either repealed, altered or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract."

A principle for finally testing the validity of the order now in question is stated in Louisville & Nashville Railroad Co. v. Interstate Commerce Commission, supra, where, respecting the reasonableness or not of an order, Judge Severens said:

"It is at this point that the judicial power over the subject may be invoked. And the rule by which it is exercised is, that, it will not interfere with the action of the Commission unless it clearly appears that it is beyond its authority and injuriously affects some substantial right of the complainant,—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such controversy."

This principle was announced by Mr. Justice White in Interstate Comm. Comm. v. Ill. Cent. R. R. Co., 215 U. S. 452, 470: "Power to make the order and not the mere expediency or wisdom of having made it, is the question."

We have thus far considered the new rates with respect to transportation commencing and ending at points within the State of Kentucky. But they must be subjected to a still further test. It is insisted by complainant's counsel that the order of the commission reducing the rates on certain commodities directly and necessarily affects interstate commerce and is in conflict with the act to regulate commerce. The averments in this behalf of the bill as
166 amended are made up rather of conclusions of counsel than of definite statements of fact. As stated by Justice Peckham

in Equitable Life Assurance Co. v. Brown, 213 U. S. 25, 43: "We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill," etc. As an example, see Southern Railway v. King, 217 U. S. 524, 536. However, it may be that some of the averments are sufficient to warrant the introduction of evidence in their support.

One averment in form is that the McChord act "is an express and direct interference with and regulation of interstate commerce" (par. IX of Bill). We have no hesitancy in saying that the act is not open to any such interpretation; nor in affirming that nothing is to be found in the rate order in dispute or in any fact either averred or shown, tending to disclose a design on the part of the commission to interfere with or to regulate interstate commerce. When we consider the bill and affidavits in connection with assertions made in the brief of complainant, we infer that it is intended to set up general classes of facts and specific facts as follows: A certain volume of interstate traffic, in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north of the Ohio River through Covington or Newport to some of the interior points named in the order. Some of this originates at Cincinnati, some further north. The existing through rate from Cincinnati is and has been the same as from Covington or Newport, and the through rate from points north of and beyond Cincinnati is and has been the same as the rate from those points to the Ohio River, plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be $38.40, and the new rate from Covington would be $24.00. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) $5.00. Under the new rates, this
167 car-load could be shipped from Cincinnati to Bardstown for not to exceed $29.00. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease unless complainant should, as it would for business reasons, reduce the through rates to (for example) $29.00. A substantially similar state of facts exists at the Louisville gateway with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in the brief). It is averred that the enforcement of the new rates will cause an annual loss of $15,600 to complainant in its rates on local shipments, and a further annual loss of $3,000 in its rates on interstate shipments; and it is stated by affidavit that there are no through rates on the articles in question from points outside the State to points within the State, such charges being assessed by combining the rates from points of origin to Louisville, to Covington or to Newport (at which points such shipments enter the State) with the rates from those points to the point of destination in Kentucky.

Since it is to the interest of both parties to this case that the actual facts should be made to appear by proper pleadings, we have con-

cluded to say that the complainant may, if it sees fit, amend its bill so far as it truthfully can aver the facts just recited and which we infer from the sources of information before pointed out to exist.

Assuming for present purposes that such or a similar state of facts as those indicated were averred and could be proved, could it be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce? If it would, it needs no argument to show that such enforcement would be violative of the federal commerce clause. It is plain enough that reduction in receipts would be one of the results of enforcement of the new rates; but it does not seem to us to follow that any of the figures adduced show direct interference with interstate rates, any more than they show unreasonable or confis-
168 catory local rates. Such a depletion of revenue would seem rather to be an indirect result of a proper exercise of purely State power. The alleged loss of $3,000 to be suffered it is said, on the through traffic, we can not accept as a statement of necessary legal consequence, because to do so would be to assume the direct effect which is in question. The loss alleged is apparently the same in principle as would be a loss or expense resulting from a due exercise of the universally recognized police power residing in the State. It is to be observed that the railroad company has made up its interstate rates by uniting its local rates with rates charged either by itself or by other companies for transportation outside of Kentucky, the bill averring that the full amount of complainant's "existing local rates in Kentucky enters into and forms a part, in most instances, of its through rates (set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910 . . .) on such interstate shipments of freight belonging to the same classes." Can it be that such combining and finding of local rates as interstate rates, remove such local rates altogether from the jurisdiction of the State for purely State purposes?

Surely Congress did not intend by the interstate commerce acts that interstate rates made and filed as plaintiff's have been, should thereafter operate not merely as interstate rates, but also as intrastate rates. To say that Congress so meant is to ascribe to that body the purpose to take over to itself the whole rate-making power, both federal and State. The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be changed except in a prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its Commission in the sense that the rates exist and must be enforced as federal-made rates. But it is expressly provided in each of
169 the interstate commerce acts, that the act shall not apply to the transportation of passengers or property "wholly within one State, and not shipped to or from a foreign country from or to any State or territory" (Act Feb. 4, 1887, 24 Stat. sec. 1, p. 379; Act June 29, 1906, 34 Stat. sec. 1, p. 584; Act June 18, 1910 sec. 6). Moreover, although the interstate rates of complainant from Jeffersonville, Indiana, or from Cincinnati, Ohio, to Bardstown

Kentucky, are the same as the rates charged from Louisville, Covington and Newport, Kentucky, still complainant's adherence to its interstate rates and its observance of the new local rates in dispute, would not under the interstate commerce act be regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. Saunders v. Southern Express Co. 18 I. C. C., 415, 421. Again, the State-made rates are not regarded by the Interstate Commerce Commission as binding "as a necessary measure of the interstate rate." Saunders v. Southern Express Co., supra, (21); Hope Cotton Oil Co. v. Texas & Pac. Ry. Co. 12 I. C. C. 265, 269. Conversely, under these decisions it is difficult to see why the State should be bound to adopt interstate rates; for, although the federal power is supreme respecting interstate rates, that would leave the State with no power at all in regard to local rates.

What is claimed is that conditions existing in Kentucky do not warrant a greater charge for the carriage of freight within Kentucky as interstate freight, than for the carriage of purely local freight; and the averment that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. The question then comes at last to this: whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just
170 and reasonable local rates imposed by the State for the transportation of traffic originating and ending wholly within the State, can be said to be a direct and not merely an indirect effect of the State's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact equivalent to a rule of law such as a federal statute forbidding interstate rates from exceeding the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts; while the rule of law may always be certainly enforced through judicial decision. Another difference is that any election by the company to change the interstate rates, would seem to be an intervening cause and consequently render such change an indirect result. Without *deducing* whether there may be facts attending the administration of a State law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates because they are local, and the State could not change them because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that so far as rate making is concerned, the State

railroad commission would have no reason to exist; and State
171 regulation of State rates would become simply historic. Before accepting such a doctrine let us briefly recall the views of the court of last resort touching the power of the State to regulate commerce carried on exclusively within its borders.

In Gibbons v. Ogden, 9 Wheat. 1, Chief Justice Marshall, after defining the meaning of the words of the commerce clause, said (194):

"It is not intended to say, that those words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States".

This rule has ever since been recognized as sound. As late as the decision rendered in the Employers' Liability Cases, 207 U. S. 463, Mr. Justice White, in announcing the opinion of the court, accepted the doctrine both as to the United States and the States, as laid down by Chief Justice Marshall in Gibbons v. Ogden. After setting out the rule concerning the power of the United States, he said (493):

"Accepting, as we now do and has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194) of those matters of State control which are not embraced in the grant of authority to Congress to regulate commerce" (setting out the portion of the decision in Gibbons v. Ogden above quoted).

We may call attention also to the language of Justice Miller in Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 565; also of the same learned Justice in Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, 459: "In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage"; and also the language of Mr. Justice Harlan in Northern Securities Co. v. United States, 193 U. S. 197, 350.

Must this long established power be now so construed as to eliminate the local rate-making power? We have seen that Congress has not so enacted. It has expressly provided that it shall not be. True, that body has not recognized any right in a State directly to
172 hamper or burden interstate commerce; and all courts recognize the supremacy of the federal power to regulate commerce among the States. Whether Congress has the power to forbid indirect interference with commerce among the States, we need not consider; for we do not discover any attempt on its part to exercise such a power. We may now turn to the consideration of some decisions which we think present features of analogy to the present question.

In Louisville & Nashville Rd. Co. v. Eubank, 184 U. S. 27, the validity of Sec. 218 of the Constitution of Kentucky was reaffirmed by the Supreme Court (33):

"We have already held, in the case of Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503 (See 518), that the section of the Kentucky Constitution above set forth, as applied to

places, all of which are within the State, violates no provision of the Federal Constitution."

The action of the commission failed because it attempted to employ an interstate rate between Nashville and Louisville as a standard for determining whether a local rate between points within Kentucky over the same road as that over which the interstate rate prevailed, was a violation of the long and short haul clause of Sec. 2188. It was in effect held that the act of the commission was a direct attempt to regulate interstate commerce. But in answer to a case assumed in argument which supposed several States to have fixed local rates within their respective borders and Congress to have fixed their sum as the rate for interstate commerce, claiming that this did not regulate or interfere with the State rates already, or from time to time adopted by the States, Justice Peckham said (42):

"In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do, and on the other hand the State by such a statute regulates the local rate, but that it has the right to do. Congress does not, directly or indirectly, interfere with local rates, by adopting their sum in the interstate rate".

We take it that we may with propriety say that we do not observe anything laid down in the opinion of the court in that case which is inconsistent with the following language of Justice Brewer, who announced the minority opinion (48):

173 "I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the Legislature of Kentucky may see fit to enforce by simply saying that outside of the State it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing."

It will not escape notice that in the present case the commission fixed the new local rates without reference to any interstate rate or traffic whatever; its action was based solely upon local conditions and local traffic and was in substantial part a restoration of old local rates which the company itself had created and had for years recognized as just and reasonable.

The company in the exercise of its rate-making power changed the local rates which it had previously maintained and included and made them a part of its through rates. Treating the commission as representing the State in the exercise of its power to prescribe local rates, it is clear that certain of the principles laid down in the opinion of the court in the Eubank case and before quoted in part, tend to sustain the order in dispute.

In Louisville & Nashville Rd. Co. v. Kentucky, supra, Justice Shiras said (518):

"It may be that the enforcement of State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power

of the general government to be unlawful must be direct, and not merely the incidental effect of enforcing the police power of a State."

In Mo. Pac. Ry. Co. v. Kansas, before cited (216 U. S. 262), the question was presented whether the railroad company could be compelled by mandamus issued by the State court, to obey an order of the Kansas board of railroad commissioners requiring it to operate a passenger train between a point within the State and the State line. The road in question was built originally as a branch line within the State of Kansas but was operated as a part of a road in Missouri, so that the line in question extended from Madison, Kansas, to Monteith Junction, Missouri, eighty-nine miles being
171 in Kansas and nineteen miles in Missouri. There were no terminal facilities at Monteith Junction, and the trains did not remain over at that point but were run as far as Butler Station, where terminal facilities exist. Among the defenses set up was one that the road was an interstate line and could be operated only as such, and was not subject to the jurisdiction of the State railroad commission for that reason; also that the burden of furnishing such passenger train service would be confiscatory. Two questions were considered by the court, one the alleged arbitrary and unreasonable character of the order, and the other that the order operated as a direct burden upon interstate commerce. Both of these questions were resolved against the company. The order there made was found to be within the power of the commission, and in that feature is analogous to the present order; and, furthermore, the holding that the order did not place a direct burden upon interstate commerce, has an important bearing upon the question now under consideration. The contention respecting the effect of the order upon interstate commerce was disposed of by the present Chief Justice (283):

"But this simply confounds the distinction between State control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation. . . ."

Further, speaking of the effect on interstate commerce, the learned Chief Justice said (284):

"The order cannot be said to be an unreasonable exertion of authority because the power manifested was made operative to the limit of the right to do so. Besides the proposition erroneously assumes that the effect of the order is to direct the stoppage at the State line of an interstate train, when, in fact, the order does not deal with an interstate train or put any burden upon such train, but simply requires the operating within the State of a local train, the duty to operate which arises from a charter obligation."

Again, answering a claim that since there were no terminal facilities at the State line the train would have to be operated not only to the State line but twenty miles beyond to Butler, it was
175 said (284):

"But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election

of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

Now, when it is recalled that one of the claims made here is that the reduction of the local rates between points on the south side of the Ohio River (like Louisville, Covington and Newport) and Bardstown will for business or economic reasons necessitate a corresponding reduction of the Jeffersonville and Cincinnati rates to Bardstown, not to speak of points north of those cities, it is hard to distinguish such a claim from that urged by the railroad company in the Kansas case in regard to the absence of terminal facilities at the state line and the consequent necessity to operate twenty miles further to Butler. This latter claim was based alone upon a business or economic reason, but the answer of the Chief Justice was that this "would be at the mere election of the corporation." This answer is equally applicable to the complaint made here. This right of election signifies choice between alternatives, in the sense that either or any one of them may be rightfully selected. The choice is to be exercised by the company. It follows that the burden on interstate rates complained of here is one that may or may not be assumed by the company, according to its financial interests. It does not follow that its averment of a present intent to assume the burden will practically be either a necessary or wise choice of alternatives, much less that the company will continue to carry the burden. The important point however is, that the Supreme Court has declared that such a burden is not in its effect direct.

We do not pass upon the validity of the second order of the commission. We think that the persons and companies in whose favor awards of reparation appear by the order to have been made, are necessary parties in interest. They have not been brought
176 into the suit.

It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant pursuant to the special provision for such review found in Sec. 17 of the Act of June 18, 1910. If the Supreme Court on such review shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremedial injury on account of failure to preserve the *status quo*. Applying the reasons of the rule stated in Hovey v. McDonald, 109 U. S. 150, 161, and further stated in Cotting v. Kansas City Stock Yard Co. *supra* (183 U. S. 79, 80), we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered.

In order that the right of appeal directly to the Supreme Court from our decision upon the motion for an interlocutory injunction

may not be embarrassed, we refrain at the present time from passing upon the demurrers.

On a day following, to wit: on the 12th day of January, A. D. 1911, a Supplemental Opinion was filed herein, which was and is in words and figures as follows, viz:

177 In the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Supplemental Opinion.

In the opinion filed January 9th we assumed a certain state of facts not fully stated in the bill, and granted leave to amend the bill accordingly. A Second amended bill, containing paragraph XXI is now tendered for filing. This amendment is much more extensive that we had contemplated, but, upon careful reading and observing the distinction between its statements of facts and its reiteration of argumentative results and legal conclusions, it does not present any question not fully considered in our opinion, and so is not beyond the intention of the leave granted. It may be filed.

January 12, 1911.

J. W. WARRINGTON,
Circuit Judge.
ARTHUR C. DENISON,
District Judge, Specially Assigned.

Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The Second Amended Bill, referred to in the foregoing Supplemental Opinion and filed herein on Jan'y 12, 1911, is in words and figures as follows, viz:

178 In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
v.
ADAM T. SILER et al., Defendants.

Second Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, Louisville & Nashville Railroad Company, brings this its amended bill of complaint against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, constituting the Railroad Commission of the State of Kentucky, defendants, and thereupon states.

XXI.

That by Section 2 of the Act to regulate commerce it is provided: "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

And complainant states that by Section 3 of said Act it is further provided:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

179 Complainant states that by Section 6 of the Act to regulate commerce, it is provided:

"That every common carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route."

Again, in the same section of the Act to regulate commerce it is provided:

"No change shall be made in the rates, fares and charges . . . which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid, which shall plainly state the change proposed to be made in the schedule then in force and the time when the changed rates, fares and charges will go into effect."

In the same section it is provided:

"No carrier . . . shall charge, or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The complainant states that the Interstate Commerce Commission has construed these provisions as requiring each interstate carrier to publish and file with the Commission its schedules of rates between different points within a single State where they are factors in the construction of an interstate rate.

Rule No. 5, as shown in Tariff Circular No. 15-A of the Interstate Commerce Commission publishing "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules and Administrative Rulings and Opinions" effective April 15, 1908, is as follows:

"The practice on part of carriers of accepting and transporting through shipments, as to which no joint rate applies, upon rates made up by combination of the rates of the several carriers participating in the movement, and of collecting, as delivering carriers, the aggregate charges of the several carriers upon such shipments, and of accounting to such carriers for their several portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore carriers may apply to through shipments rates to and from stations to and from which there is no applicable published joint rate by using lawfully published bases, locals or proportionals, in connection with other lawfully published tariffs.

Tariffs containing basing or proportional rates must specify clearly the extent and manner of their use, and tariffs that are
180 especially intended for use in connection with published basing rates must show the I. C. C. numbers of tariffs in which bases can be found.

A carrier may provide in its tariffs that, in the absence of a specific rate from point of origin to destination of a through shipment, combination rate to or via certain points will be made upon specified basing point or points, or by using certain specified tariffs or rates, and the combination rate so specified will be the lawful rate for that shipment.

If no specific rate from point of origin to destination of a through

shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment.

Such combination through rate must be treated as a unit from the date of original shipment to the date of its arrival at destination, and the rate applied must be the combination of the rates which exist upon the date of original shipment. All of the conditions, regulations, and privileges obtaining as to any factor in such combination rate for through shipment at the time of original shipment upon such combination through rate must be adhered to and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination. A local or proportional rate 'in' cannot be absorbed, diminished, or affected by any 'out' rate not in effect at the time when the traffic moved upon such local or proportional rate."

The complainant further states that in the "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules and Administrative Rulings and Opinions" of said Commission, approved June 28, 1909, Tariff Circular 17-A, effective September 1, 1909, page 30, the Interstate Commerce Commission has made the following ruling:

"13. (*h*) Rates for through shipments are often made by adding together two or more rates. All state or other rates used in combination for interstate shipments must be posted at points from which they apply and filed with the Commission, and can only be changed as to such traffic in accordance with the terms of the Act. The Commission believes it proper that all local tariffs be given I. C. C. numbers and be posted and filed with the Commission in manner prescribed in the Act."

The complainant states that the Interstate Commerce Commission in its "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules," last referred to, adopted the following rule which has ever since and is now in full force and effect (Rule 56), to wit:

(*b*) "Many informal complaints are received in connection with regularly established through rates or fares which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate or fare except after full hearing upon the formal complaint. It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider the through rate or fare which is higher than the sum of the locals between the same points as *prima facie* unreasonable and that the burden of proof would be upon the carrier to defend such higher through rate or fare."

181 Complainant further states that the Interstate Commerce Commission on October 14, 1910, in the matter of application for relief under the fourth section of the Act of June 18, 1910, entered the following order:

"It is further ordered, That the Commission reaffirm its previously

expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is prima facie unreasonable (Rule 56 (*b*) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases."

Complainant states it has obeyed and followed these rulings of the Interstate Commerce Commission, where the same were applicable, in the construction of its interstate rates and in the publishing and filing of its tariffs of such rates with that Commission.

Complainant states that the City of Cincinnati, Ohio, is situated on the north side of the Ohio River, which forms the State Line between Ohio and Kentucky, and that complainant's rates from said City situated on the North side of said river at the crossing thereof, for example, from Cincinnati to interior points in Kentucky, are and have always been the same or no higher than from Covington or Newport, Kentucky, immediately opposite on the south side of the Ohio River, to the same interior points in Kentucky on the same kinds of freight or commodities carried in the same quantities and under the same conditions. No difference, in other words, is, or has been, made between the interstate and intrastate rates of the complainant from Cincinnati, or from Covington, or Newport to said interior points in Kentucky.

The Complainant further states that, if the rates fixed by the order of the defendants, constituting the Railroad Commission of Kentucky, dated August 10, 1910, are allowed to go into effect, immediately there will result an unjust discrimination against Cincinnati and all dealers in grain and other commodities used in the manufacture and shipment of whisky located and doing business in that city, who sell and ship the same to the interior stations on
182 complainant's lines in Kentucky named in said order, and they will be subjected at once to "an undue or unreasonable prejudice or disadvantage" and will have to pay the existing interstate rates on said commodities, as set out in complainant's tariffs published and on file with the Interstate Commerce Commission, whereas, like dealers doing business just across the Ohio River or State line, in Covington or Newport, Kentucky, under substantially similar circumstances and conditions, can and will sell and ship the same commodities in the same quantities to the same interior distillery points in Kentucky on complainant's lines at the materially lower rates prescribed in said order, and will, therefore, receive "an undue or unreasonable preference or advantage."

Complainant states that there exists no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order, originating at Covington or Newport, are or would be entitled to be transported to said distillery points at less rates than are in force and covered by said interstate tariffs from those points on interstate shipments coming from without the State of Kentucky, or from Cincinnati.

The complainant further states that what is true of complainant's rates on said articles and commodities at the Cincinnati crossing of

the Ohio river is likewise true of its rates at the Louisville crossing of said river.

The table filed herewith as part hereof marked "Statement No. 1" compiled from the existing official tariffs of complainant on file with the Railroad Commission of Kentucky and the Interstate Commerce Commission, respectively, effective March 25, 1910, ever since and now in force, illustrates what has been above stated with respect to the complainant's present rates, applicable to interstate and intrastate shipments from the Cincinnati crossing of the Ohio river, as compared with the State Commission's rates from Covington and Newport, Kentucky, to the three interior points in Kentucky named in the order of August 10, 1910, on grain and other articles and commodities shipped in quantities as set out in said order, and
183 shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof marked "Statement No. 2", compiled from the same sources, shows complainant's rates on said articles and commodities shipped in quantities set out in said order, applicable to interstate and intrastate shipments from the Louisville crossing of the Ohio river, as compared with the State Commission's rates to the 16 interior points in Kentucky named in said order, and shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof, marked "Statement No. 3", compiled from the same sources, shows complainant's rates from Cincinnati, applicable on interstate traffic originating there and also at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Covington and Newport, Kentucky, applicable on intrastate traffic from the latter points proper, and also on interstate traffic originating at points north of the Ohio river (not on complainant's lines); and the rates ordered by the State Commission applicable on intrastate traffic from Covington and Newport, Kentucky, all to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

The table filed herewith as part hereof, compiled from the same sources, marked "Statement No. 4", shows complainant's present rates from Louisville, Kentucky, applicable on interstate traffic, originating at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Louisville, Kentucky, applicable on intrastate traffic, and the rates ordered by the State Commission applicable on intrastate traffic from Louisville, Kentucky, to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

184 The complainant further states that at least one-sixth of the total volume or movement of said articles and commodities as set out in said order from Covington and Newport to the 3 interior points in Kentucky named therein, to wit: Bardstown, Coon Hollow and Silver Creek, and from Louisville to the 16 points in the interior of Kentucky named in said order, is and will continue to be in inter-

state commerce, or originates and will originate at points outside of the State of Kentucky, and is and will be transported across the Ohio river at Cincinnati and Louisville to complainant's lines in Kentucky.

Complainant further states that prior to February 10, 1910, its special rates on distillers' supplies, or the articles and commodities set out in said order of August 10, 1910, were applied on both interstate and intrastate traffic to 48 stations in all on complainant's lines in Kentucky, including the 16 named in said order, where distillery plants were, have been since, and are now located, namely:

Athertonville	Eminence	Lotus
Bardstown	Falmouth	Memphis Junction
Berry	Garnett	Morgan
Bloomfield	Gethsemane	Nazareth
Bourbon	Gilbert	New Hope
Boyd	Greenbrier	Campbellsville
Calvary	Levingood	Chapeze
Early Times	Loretto	Chicago
Clermont	Hunters	Robinson
Coon Hollow	Jett	St. Marys
Crab Orchard	Kellers	Samuels
Cynthiana	Kiserton	Shawhan
Dants	Lair	Silver Creek
Deatsville	Lancaster	Silver Springs
Haden	Lebanon	Willow Springs
Hobbs	Poindexter	Withrow;

that from February 10, 1910, to March 25, 1910, its said special rates on distillers' supplies as aforesaid were applied on intrastate traffic to all of said 48 stations; and that since March 25, 1910, complainant's present rates, as covered by the tariffs aforesaid on file with the State Commission and Interstate Commerce Commission, have applied and are still in force from Louisville, Covington and Newport, Kentucky, to all of said 48 stations on such supplies, articles or commodities shipped in quantities as set forth in said order of the Commission.

185 Complainant states that the volume or movement in said supplies, articles and commodities from said cities on the Ohio River to the 32 stations at which such distillery plants are located, other than the 16 named in said order, has heretofore been and will continue to be at least three times as great as the volume or movement of such supplies, articles, or commodities from and through said cities on the Ohio River to the 16 points covered by said Commission's order; and the complainant's loss in revenue, if it is compelled to put in the rates prescribed by said order to said 32 stations from said cities in Kentucky on the Ohio River, will be at least three times as great as its loss in revenue will be on account of having to put in the reduced rates prescribed by said order from said Ohio River cities to the 16 points named in said order, or will be a loss of at least $54,000 annually in its rates, intrastate and inter-

state, on such shipments to said 32 distillery stations, as compared with a loss of at least $18,600 on intrastate and interstate shipments to said 16 distillery stations. These losses will be exclusive of those on shipments of like commodities to consignees other than distillers at said points, which if included, would make the total losses to complainant very much larger per annum.

Complainant further states that at least one half of the volume or movement of such supplies, articles, or commodities to said 32 distillery points has heretofore been and will continue to be in interstate commerce, entering the State of Kentucky at the Cincinnati and Louisville crossings of the Ohio River, and if complainant be compelled to apply the rates prescribed by said order to such interstate shipments to said 32 distillery stations, its loss on its interstate revenues will be at least $27,000 annually, and its loss on its intrastate shipments to said 32 distillery stations will be as much as the last named amount annually.

The complainant states that a large volume of interstate traffic in corn, rye, barley, malt, and other distillers' supplies is constantly moving from points north and west of the Ohio River
186 through Covington and Newport to the distillery stations named in the said order of August 10, 1910, as well as the 32 other distillery stations on complainant's lines in Kentucky, and the through rate charged and collected thereon from points north and west and beyond Cincinnati is and has been the same as the rate from those points of origin to the Ohio river, plus the rate south of the river.

The complainant states that the direct, immediate and necessary operation and effect of the putting into force of the intrastate rates on the commodities as prescribed in said order of August 10, 1910, will be to compel complainant, unless it surrenders its right to transact such interstate commerce business, and gives it up entirely, either, on the one hand, to change and reduce its existing rates (which are just and reasonable and covered by its tariffs on file with the Interstate Commerce Commission, as aforesaid) on interstate shipments of like commodities, originating at Cincinnati and other points outside of Kentucky, north and west of the Ohio River, and entering that State at the Cincinnati or Louisville crossing of the Ohio River, destined to the points named in said order, or, on the other hand, to continue its said rates on interstate shipments in full force and effect without change or reduction, leaving them materially and substantially higher on the same commodities shipped in like quantities from Cincinnati and other points outside of Kentucky for the same distances in Kentucky, or on the south side of the Ohio river, to the same destinations named in said order, thus creating unjust discriminations against shippers of such traffic in interstate commerce by charging, demanding, collecting and receiving from them a greater compensation for the service rendered in the transportation of property than it charges, demands, collects or receives from other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, as well as giving undue and

unreasonable preferences or advantages to the shippers of
187 such traffic in intrastate commerce in Kentucky, and subjecting such shippers of the same class of traffic to the same destinations from points outside of the State of Kentucky, and the city of Cincinnati and other localities north and west of the Ohio river to undue and unreasonable prejudice and disadvantage in said respects, in violation of the provisions of Sections 2 and 3 of the Act to regulate commerce, hereinabove quoted.

Complainant states that said order of August 10, 1910, is illegal and void because it thus substantially interferes with, burdens and regulates interstate commerce and hampers the enforcement of the Act to regulate commerce, and compels complainant to abandon or surrender the rights which it has under the Constitution and laws of the United States to exercise, and places complainant in such a position that it cannot enjoy its rights and powers under said Constitution and laws in the transportation of interstate traffic and at the same time obey the provisions of the said order.

The complainant further states that it cannot obey the provisions of said order with respect to the 16 distillery stations alone out of the 48 distillery stations in all on its lines in Kentucky without violating the provisions of Section 817, Kentucky Statutes, against unjust discrimination, and the provisions of Section 818, Kentucky Statutes, against making or giving undue or unreasonable preferences or advantages and against creating undue or unreasonable prejudice or disadvantage, and the necessary result of putting in the rates under the Commission's order would be to compel complainant to reduce the intrastate rates proportionately to each of said other 32 stations at which distilleries are located, or to violate the provisions of the Kentucky Statutes aforesaid, and the necessary, immediate and direct burden upon the interstate rates to said 32 distillery stations would similarly be imposed, and as to these complainant would be compelled to surrender its rights under the Constitution and laws of the United States precisely as in the case of the interstate rates to said 16 distillery stations set forth in the Commission's order.

188 Wherefore, Complainant prays as in its original bill as amended, and for all other relief to which it may appear to be entitled.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Complainant.

STATE OF KENTUCKY,
Jefferson County, set:

Personally appeared before me, G. W. B. Olmstead, a Notary Public in and for the County and State aforesaid, W. L. Mapother, First Vice President of the complainant, Louisville & Nashville Railroad Company, and states he knows the contents of the foregoing amended bill; that the facts therein stated as of complainant's own

STATEMENT No. 1.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Comparison of rates ordered by State Commission from Covington and Newport, Ky., applicable on intrastate traffic, with complainant's present rates applicable on interstate traffic from Cincinnati, Ohio, Covington and Newport, Ky., and on intrastate traffic from Covington and Newport, Ky., showing the discrimination created by said orders in favor of intrastate traffic and against interstate traffic.

Commodities.	Destination.	1. Complainant's present rates from Cincinnati, Ohio, applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	2. Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	3. Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	4. Difference in favor of intrastate traffic between rates ordered by State commission from Covington and Newport, applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Cincinnati, Ohio, Covington and Newport, Ky., and on intrastate traffic from Covington and Newport, Ky.	
					Cincinnati, Ohio.	Covington & Newport, Ky.
Barrel & Box Material, K. D., C. L., min. 30,000#. per 100 lbs.	Bardstown, Ky.	11	11	11	..	..
	Coon Hollow, "	12	12	12	..	..
	Silver Creek, "	10	10	10	..	..
Barrel Material, K. D., L. C. L., per 100 lbs.	Bardstown, "	23	28	23	..	5
	Coon Hollow, "	30	34	20.5	9½	13½
	Silver Creek, "	19	19	19	..	..
Barrels, Empty, min. 120 bbls., C. L., per bbl.—(est. wt., 60 lbs.).	Bardstown, "	*a* 13.8	*a* 16.8	14	..	2.8
	Coon Hollow, "	*a* 18	*a* 20.4	14	4	6.4
	Silver Creek, "	*a* 11.4	*a* 11.4	12	..	..
Bottle Caps Metal, Any quantity, per 100 lbs.	Bardstown, "	43	43	43	..	..
	Coon Hollow, "	46	50	37.5	8½	12½
	Silver Creek, "	35	35	35	..	..
Bottle Covers, paper or	Bardstown, "	*b* 23	*b* 28	23	..	5

Bottle Covers, paper or straw, packed or pressed in bales, C. L., min. 15,000, per 100 lbs.	Bardstown, "	*b* 23		*b* 28		23	..	5	
	Coon Hollow, "	*b* 30		*b* 34		20.5	9½	13½	
	Silver Creek, "	*b* 19		*b* 19		19	..	..	
Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs.	Bardstown, "	29		32		29	..	3	
	Coon Hollow, "	36		38		33	3	5	
	Silver Creek, "	25		25		*31	..	..	
Bottles, Common, packed, released, C. L., min. 24,000#, per 100 lbs.	Bardstown, "	24		30		25	..	5	
	Coon Hollow, "	32		36		23.5	8½	12½	
	Silver Creek, "	21		21		21	..	..	
Bottles, Common, packed, released, L. C. L., per 100 lbs.	Bardstown, "	35		37		31.5	4½	6½	
	Coon Hollow, "	43		44		28.5	14½	13½	
	Silver Creek, "	31		31		25	6	6	
		C. L., min. 15,000 lbs.	L. C. L.	C. L., min. 15,000 lbs.	L. C. L.		C. L.	L. C. L.	C. L. L. C. L.
Boxes, Empty, Any quantity, per 100 lbs.	Bardstown, Ky.	23	49	28	49	28	..	21	.. 21
	Coon Hollow, "	30	53	34	57	21.5	8½	31½	12½ 35½
	Silver Creek, "	19	40	19	40	19	..	21	.. 21
Corn, Rye, Malt, or Barley, C. L., min. 24,000 lbs., per 100 lbs.	Bardstown, "		16		16	10	6	6	
	Coon Hollow, "		18		18	11	7	7	
	Silver Creek, "		13		13	10	3	3	
Iron, Hoop, C. L., min. 24,000 lbs., per 100 lbs.	Coon Hollow, "		29		29	17	12	12	

AUTHORITIES.

Cincinnati Local No. 2 (I. C. C. No. A-11357), February 17, 1910.
Covington-Newport Local Tariff No. 1 (I.C.C. No. A-11358), intrastate Jan'y 14, 1910, interstate Feb'y 17, 1910.
* Covington 25¢.
a Minimum 10,000 lbs., or 166⅔ bbls.
b Minimum weight 24,000 lbs.

STATEMENT No. 2. SHEET 1.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Comparison of rates ordered by State Commission from Louisville, Ky., applicable on intrastate traffic, with complainant's present rates applicable on interstate traffic from Louisville, Ky., and on intrastate traffic from Louisville, Ky., showing the discrimination created by said orders in favor of intrastate traffic and against interstate traffic.

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Barrel and Box Material, K. D., C. L., minimum 30,000 lbs., per 100 lbs.	Bardstown,	Ky.	5	5	5	..
	Chapeze,	"	5	5	5	..
	Chicago,	"	5	5	5	..
	Clermont,	"	5	5	5	..
	Coon Hollow,	"	5	5	5	..
	Deatsville,	"	6	6	6	1
	Early Times,	"	5	5	5	..
	Eulinetee,	"	5	5	6	1
	Gethsemane,	"	5	5	5	2
	Greenbrier,	"	5	5	5	..
	Hobbs,	"	5	5	6	1
	Lebanon,	"	5	5	5	..
	Loretto,	"	5	5	6	1
	St. Marys,	"	5	5	5	..
	Samuels,	"	6	6	6	..
	Silver Creek,	"	10	10	10	..
	Bardstown,	Kentucky.	15	15	15	..
	Chapeze,	"	13	13	13	..
	Chicago,	"	22	22	15	7
	Clermont,	"	13	13	13	..
	Coon Hollow,	"	22	22	15	7
	[illegible]	"	15	15	15	..
	[illegible]	"	[illegible]	[illegible]	[illegible]	6

	[illegible]								..
	Coon Hollow,	"	22		22			15	7
	Deatsville,	"	15		15			15	..
Barrel and Box Material, K. D., L. C. L., per 100 lbs.	Early Times,	"	21		21			15	6
	Eminence,	"	17		17			15	2
	Gethsemane,	"	21		21			15	6
	Greenbrier,	"	21		21			15	6
	Hobbs,	"	13		13			13	..
	Lebanon,	"	26		26			15	11
	Loretto,	"	23		23			15	8
	St. Marys,	"	24		24			15	9
	Samuels,	"	15		15			15	..
	Silver Creek,	"	19		19			19	..
	Bardstown,	Kentucky.	9.	Min. 10,000 lbs.	9.	Min. 10,000 lbs.		9	..
	Chapeze,	"	7.8	"	7.8	"		9	..
	Chicago,	"	13.2	"	13.2	"		10	3.2
	Clermont,	"	7.8	"	7.8	"		9	..
	Coon Hollow,	"	13.2	"	13.2	"		10	3.2
Barrels, empty, minimum 120 brls., C. L., per brl. (est. weight 60 lbs. per bbl.).	Deatsville,	"	9.	"	9.	"		9	..
	Early Times,	"	12.6	"	12.6	"		9	3.6
	Eminence,	"	10.2	"	10.2	"		10	.2
	Gethsemane,	"	12.6	"	12.6	"		10	2.6
	Greenbrier,	"	12.6	"	12.6	"		9	3.6
	Hobbs,	"	7.8	"	7.8	"		9	..
	Lebanon,	"	15.6	"	15.6	"		10	5.6
	Loretto,	"	13.8	"	13.8	"		10	3.8
	St. Marys,	"	14.4	"	14.4	"		10	4.4
	Samuels,	"	9.	"	9.	"		9	..
	Silver Creek,	"	11.4	"	11.4	"		12	..

Authority: Louisville Local Tariff No. 1—I. C. C. No. A-11282, effective { Interstate, January 23, 1910. / Intrastate, December 31, 1909.

(Continued on Sheet 2).

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Bottle Caps, Metal, any quantity, per 100 lbs.	Bardstown,	Kentucky.	23	23	23	..
	Chapeze,	"	20	20	20	..
	Chicago,	"	32	32	26	6
	Clermont,	"	20	20	20	..
	Coon Hollow,	"	32	32	26	6
	Deatsville,	"	23	23	23	..
	Early Times,	"	30	30	23	7
	Eminence,	"	25	25	25	..
	Gethsemane,	"	30	30	26	4
	Greenbrier,	"	30	30	23	7
	Hobbs,	"	20	20	23	..
	Lebanon,	"	39	39	26	13
	Loretto,	"	34	34	26	8
	St. Marys,	"	35	35	26	9
	Samuels,	"	23	23	23	..
	Silver Creek,	"	35	35	35	..
Bottle Covers, paper, or straw packed or pressed in bales, C.L., minimum 15,000 lbs. per car 100 lbs.	Bardstown,	Kentucky.	15 Min. 24,000 lbs.	15 Min. 24,000 lbs.	15	..
	Chapeze,	"	13 "	13 "	13	..
	Chicago,	"	22 "	22 "	15	7
	Clermont,	"	13 "	13 "	13	..
	Coon Hollow,	"	22 "	22 "	15	7
	Deatsville,	"	15 "	15 "	15	..
	Early Times,	"	21 "	21 "	15	6
	Eminence,	"	17 "	17 "	17	..
	Gethsemane,	"	21 "	21 "	15	6
	Greenbrier,	"	21 "	21 "	15	6
	Hobbs,	"	13 "	13 "	15	6

	Silver Creek,	"	19	"	19	"	19	..
Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs.	Bardstown,	Kentucky.	17		17		17	..
	Chapeze,	"	15		15		15	..
	Chicago,	"	25		25		25	..
	Clermont,	"	15		15		15	..
	Coon Hollow,	"	25		25		23	2
	Deatsville,	"	17		17		17	..
	Early Times,	"	23		23		20	3
	Eminence,	"	19		19		19	..
	Gethsemane,	"	23		23		20	3
	Greenbrier,	"	23		23		20	3
	Hobbs,	"	15		15		15	..
	Lebanon,	"	31		31		23	8
	Loretto,	"	26		26		23	3
	St. Marys,	"	28		28		23	5
	Samuels,	"	17		17		20	..
	Silver Creek,	"	25		25		31	..
Bottles, common, packed, released, C. L., minimum 24,000 pounds, per 100 lbs.	Bardstown,	Kentucky.	16		16		16	..
	Chapeze,	"	14		14		10	4
	Chicago,	"	24		24		17	7
	Clermont,	"	14		14		14	..
	Coon Hollow,	"	24		24		17	7
	Deatsville,	"	16		16		16	..
	Early Times,	"	22		22		16	6
	Eminence,	"	18		18		18	..
	Gethsemane,	"	22		22		17	5
	Greenbrier,	"	22		22		16	6
	Hobbs,	"	14		14		14	..
	Lebanon,	"	28		28		17	11
	Loretto,	"	25		25		15	10
	St. Marys,	"	26		26		15	11
	Samuels,	"	16		16		16	..
	Silver Creek,	"	21		21		21	..

Authority: Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective, { Interstate, Jan. 23, 1910. / Intrastate, Dec. 31, 1909.

(Continued on Sheet 3.)

STATEMENT No. 2, SHEET No. 3 (Continued from Sheet 2).

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Bottles, common, packed, released, L. C. L., per 100 lbs.	Bardstown,	Kentucky.	20	20	17	3
	Chapeze,	"	17	17	15	2
	Chicago,	"	28	28	20	8
	Clermont,	"	17	17	17	..
	Coon Hollow,	"	28	28	20	8
	Deatsville,	"	20	20	17	3
	Early Times,	"	27	27	17	10
	Eminence,	"	22	22	22	..
	Gethsemane,	"	27	27	20	7
	Greenbrier,	"	27	27	17	10
	Hobbs,	"	17	17	17	..
	Lebanon,	"	34	34	20	14
	Loretto,	"	30	30	20	10
	St. Marys,	"	31	31	20	11
	Samuels,	"	20	20	17	3
	Silver Creek,	"	31	31	25	6
						C.L. L.C.L.
Boxes, empty, any quantity, per 100 lbs.	Bardstown,	Kentucky.	17 C.L. Min. 26 L.C.L.	15 C.L. Min. 26 L.C.L.	15	.. 11
	Chapeze,	"	13 " 15,000 23 "	13 " 15,000 23 "	15	.. 8
	Chicago,	"	22 " lbs. 37 "	22 " lbs. 37 "	15	7 22
	Clermont,	"	13 " 23 "	13 " 23 "	13	.. 10
	Coon Hollow,	"	22 " 37 "	22 " 37 "	15	7 22
	Deatsville,	"	15 " 26 "	15 " 26 "	15	.. 11
	Early Times,	"	21 " 35 "	21 " 35 "	15	6 20
	Eminence,	"	17 " 29 "	17 " 29 "	17	.. 12
	Gethsemane,	"	21 " 35 "	21 " 35 "	15	6 20
	Greenbrier,	"	21 " 35 "	21 " 35 "	15	6 20
		"	13 " 23 "	13 " 23 "	13	.. 10

lbs.	Gethsemane,	"	21 "	35 "	21 "	35 "	15	6	20
	Greenbrier,	"	21 "	35 "	21 "	35 "	15	6	20
	Hobbs,	"	13 "	23 "	13 "	23 "	13	..	10
	Lebanon,	"	26 "	45 "	26 "	45 "	15	11	30
	Loretto,	"	23 "	39 "	23 "	39 "	15	8	24
	St. Marys,	"	24 "	41 "	24 "	41 "	15	9	26
	Samuels,	"	15 "	26 "	15 "	26 "	15	..	11
	Silver Creek,	"	19 "	40 "	19 "	40 "	19	..	21
Corn, Rye, Malt, or Barley, C. L., minimum 24,000 pounds, per 100 lbs.	Bardstown,	Kentucky.	8	8	5	3
	Chapeze,	"	8	8	5	3
	Chicago,	"	10	10	6	4
	Clermont,	"	8	8	5	3
	Coon Hollow,	"	10	10	6	4
	Deatsville,	"	8	8	5	3
	Early Times,	"	10	10	5	5
	Eminence,	"	9	9	6	3
	Gethsemane,	"	10	10	6	4
	Greenbrier,	"	10	10	5	5
	Hobbs,	"	8	8	5	3
	Lebanon,	"	12	12	6	6
	Loretto,	"	11	11	6	5
	St. Marys,	"	11	11	6	5
	Samuels,	"	8	8	5	3
	Silver Creek,	"	13	13	10	3
Iron, Hoop, C. L., minimum 24,000 lbs., per 100 lbs.	Chapeze,	Kentucky.	13	13	8	5
	Chicago,	"	21	21	12½	8½
	Coon Hollow,	"	21	21	12½	8½
	Eminence,	"	17	17	17	..
	Gethsemane,	"	21	21	12½	8½
	Lebanon,	"	21	21	12½	8½
	Loretto,	"	21	21	12½	8½
	St. Marys,	"	21	21	12½	8½

Authority: L. & N. R. R. Louisville Local Tariff No. 1.
I. C. C. No. A–11282, effective, Intrastate, December 31, 1909.
" Interstate, January 23, 1910.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Statement showing Complainant's Rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and also at points north of the Ohio River (not on the L. & N. R. R.): Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic from those points proper and also on interstate traffic originating at points (not on the L. & N. R. R.) north of the Ohio River, and the rates ordered by the State Commission applicable on intrastate traffic from Covington and Newport, Kentucky.

Destination.	1. Complainant's present rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	2. Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	Distance.	3. Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Covington and Newport, Ky., as modified by State commission's order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission's order.
Box and Barrel Material, K. D., C. L., minimum 20,000 lbs., per 100 lbs.						
Falmouth, Ky.	5	5	38	..	5	..
Levingood, Ky.	6	5	42	..	5	..
Morgan, Ky.	6	6	45	..	6	..
Boyd, Ky.	6	6	50	..	6	..
Berry, Ky.	6	6	52	..	6	..
Robinson, Ky.	7	7	55	..	7	..
Garnet, Ky.	7	7	58	..	7	..
Poindexter, Ky.	7	7	60	..	7	..
Kellers, Ky.	7	7	62	..	7	..
Cynthiana, Ky.	7	7	64	..	7	..
Lair, Ky.	8	8	67	..	8	..
Shawhan, Ky.	8	8	71	..	8	..
Kiserton, Ky.	8	8	73	..	8	..
Eminence, Ky.	8	8	94	..	8	..
Silver Springs, Ky.	7	8	103	..	8	..
Jetts, Ky.	7	8	120	..	8	..
Silver Creek, Ky.	10	10	127	10	10	..
Chapeze, Ky.	10	10	132	..	10	..

Chapeze, Ky.	10	10	132	..	10	..
Clermont, Ky.	10	10	133	..	10	..
Hobbs, Ky.	10	10	135	..	11	..
Lotus, Ky.	11	11	137	..	11	..
Deatsville, Ky.	11	11	139	..	11	..
Samuels, Ky.	11	11	141	..	11	..
Bloomfield, Ky.	9	10	141	..	10	..
Lancaster, Ky.	10	10	143	..	10	..
Hunters, Ky.	11	11	144	..	11	..
Nazareth, Ky.	11	11	145	..	11	..
Bourbon, Ky.	11	11	145	..	11	..
Withrow, Ky.	11	11	146	..	11	..
Gilbert, Ky.	11	11	146	..	11	..
Bardstown, Ky.	11	11	147	11	11	..
Haden, Ky.	11	11	149	..	11	..
Early Times, Ky.	12	11	150	..	11	..
Athertonville, Ky.	11	11	152	..	11	..
Greenbrier, Ky.	12	12	153	..	12	..
Gethsemane, Ky.	12	12	156	..	12	..
New Hope, Ky.	12	12	158	..	12	..
Willow Springs, Ky.	12	12	159	..	12	..
Coon Hollow, Ky.	12	12	160	12	12	..
Dants, Ky.	12	12	161	..	12	..
Chicago, Ky.	12	12	163	..	12	..
Loretto, Ky.	11	12	165	..	12	..
St. Marys, Ky.	11	12	170	..	12	..
Crab Orchard, Ky.	11	11	172	..	11	..
Lebanon, Ky.	11	11	175	..	11	..
Calvary, Ky.	14	14	181	..	14	..
Campbellsville, Ky.	14	14	195	..	14	..
Memphis Junction, Ky.	15	15	226	..	15	..

Box and Barrel Material, K. D., L. C. L., per 100 lbs.

Falmouth, Ky.	10	10	38	..	10	..
Levingood, Ky.	10	10	42	..	10	..
Morgan, Ky.	10	10	45	..	10	..
Boyd, Ky.	11	11	50	..	11	..
Berry, Ky.	11	11	52	..	11	..
Robinson, Ky.	12	12	55	..	12	..
Garnet, Ky.	12	12	58	..	12	..
Poindexter, Ky.	12	12	60	..	12	..
Kellers, Ky.	12	12	62	..	12	..
Cynthiana, Ky.	12	12	64	..	12	..
Lair, Ky.	13	13	67	..	13	..
Shawhan, Ky.	13	13	71	..	13	..
Kiserton, Ky.	13	13	73	..	13	..
Eminence, Ky.	24	24	94	..	24	..
Silver Springs, Ky.	15	17	103	..	17	..
Jetts, Ky.	21	15	120	..	15	..
Silver Creek, Ky.	19	19	127	19	19	..
Chapeze, Ky.	21	26	132	..	26	..
Clermont, Ky.	21	26	133	..	26	..
Hobbs, Ky.	21	26	135	..	26	..
Lotus, Ky.	23	28	137	..	28	..
Deatsville, Ky.	23	28	139	..	28	..
Samuels, Ky.	23	28	141	..	28	..
Bloomfield, Ky.	25	28	141	..	28	..
Lancaster, Ky.	22	22	143	..	22	..
Hunters, Ky.	23	28	144	..	28	..
Nazareth, Ky.	23	28	145	..	28	..
Bourbon, Ky.	23	28	145	..	28	..
Withrow, Ky.	23	28	146	..	28	..
Gilbert, Ky.	20	22	146	..	22	..
Bardstown, Ky.	23	28	147	23	23	..
Haden, Ky.	20	22	149	..	22	..
Early Times, Ky.	29	32	150	..	32	..
Athertonville, Ky.	29	32	152	..	32	..
Greenbrier, Ky.	29	33	153	..	33	..
Gethsemane, Ky.	29	34	156	..	34	..
New Hope, Ky.	29	34	158	..	34	..
Willow Springs, Ky.	30	34	159	..	34	..
Coon Hollow, Ky.	30	34	160	20½	20½	9½
Dants, Ky.	30	34	161	..	34	..
Chicago, Ky.	30	34	163	..	34	..
Loretto, Ky.	31	34	165	..	34	..
St. Marys, Ky.	28	34	170	..	34	..
Crab Orchard, Ky.	31	31	172	..	31	..
Lebanon, Ky.	30	30	175	..	30	..
Calvary, Ky.	35	35	181	..	35	..
Campbellsville, Ky.	35	35	195	..	35	..
Memphis Junction, Ky.	38	43	226	..	43	..

Authority: Covington-Newport Local Tariff No. 1—I. C. C. No. A 11358, effective, Interstate, Feb. 17, 1910. Intrastate, Jan. 14, 1910.
Cincinnati Local Tariff No. 2—I. C. C. No. A 11357, effective February 17, 1910.

Destination.		Complainant's present rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	Distance.	Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Covington and Newport, Ky., as modified by State commission's order.	Differences in favor of intrastate traffic and against interstate traffic created by State commission's order.
Iron, Hoop, C. L., minimum 24,000 lbs., per 100 lbs.							
Falmouth,	Kentucky.	10	10	38	..	10	..
Levingood,	"	10	10	42	..	10	..
Morgan,	"	10	10	45	..	10	..
Boyd,	"	11	11	50	..	11	..
Berry,	"	11	11	52	..	11	..
Robinson,	"	12	12	55	..	12	..
Garnett,	"	12	12	58	..	12	..
Poindexter,	"	12	12	60	..	12	..
Kellers,	"	12	12	62	..	12	..
Cynthiana,	"	12	12	64	..	12	..
Lair,	"	13	13	67	..	13	..
Shawhan,	"	13	13	71	..	13	..
Kiserton,	"	13	13	73	..	13	..
Eminence,	"	24	24	94	..	24	..
Silver Springs,	"	16	17	103	..	17	..
Jetts,	"	20	10	120	..	10	..
Silver Creek,	"	19	19	127	..	19	..
Chapeze,	"	22	26	132	..	26	..
Clermont,	"	22	26	133	..	26	..
Hobbs,	"	22	26	135	..	26	..
Lotus,	"	24	27	137	..	27	..
Deatsville,	"	24	28	139	..	28	..
Samuels,	"	24	28	141	..	28	..
Bloomfield,	"	25	25	141	..	25	..
Lancaster,	"	20	20	143	..	20	..
Hunters,	"	24	28	144	..	28	..
Nazareth,	"	24	28	145	..	28	..
Bourbon,	**"**	**24**	**28**	**145**	**..**	**28**	**..**

Deatsville,	"	24	28	141	..	28	..	
Samuels,	"	25	25	141	..	25	..	
Bloomfield,	"	20	20	143	..	20	..	
Lancaster,	"	24	28	144	..	28	..	
Hunters,	"	24	28	145	..	28	..	
Nazareth,	"	24	28	145	..	28	..	
Bourbon,	"	24	28	146	..	28	..	
Withrow,	"	19	20	146	..	20	..	
Gilbert,	"	24	28	147	..	28	..	
Bardstown,	"	19	20	149	..	20	..	
Haden,	"	29	28	150	..	28	..	
Early Times,	"	28	28	152	..	28	..	
Athertonville,	"	29	28	153	..	28	..	
Greenbrier,	"	28	28	156	..	28	..	
Gethsemane,	"	28	28	158	..	28	..	
New Hope,	"	29	28	159	..	28	..	
Willow Springs,	"	29	29	160	17	17	12	
Coon Hollow,	"	29	29	161	..	29	..	
Dants,	"	29	29	163	..	29	..	
Chicago,	"	29	29	165	..	29	..	
Loretto,	"	29	29	170	..	29	..	
St. Marys,	"	25	26	172	..	26	..	
Crab Orchard,	"	29	29	175	..	29	..	
Lebanon,	"	30	30	181	..	30	..	
Calvary,	"	30	30	195	..	30	..	
Campbellsville,	"	31	31	226	..	31	..	
Memphis Junction,	"							

Authority: Cincinnati Local Trf. No. 2, I. C. C. A-11357.
Covington-Newport Local Tariff No. 1. I. C. C. A-11358.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Statement showing complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points north of the Ohio River (not on the L. & N. R. R.), complainant's present rates from Louisville, Ky., applicable on intrastate traffic, and the rates ordered by the State Commission applicable on intrastate traffic from Louisville, Ky.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points not on L. & N. R. R. north of Ohio river.	Dist.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission order.
Box and Barrel Material, K. D., C. L. min. 30,000 lbs., per 100 lbs.							
Chapeze,	Ky.	5	24	5	5	5	..
Clermont,	"	5	25	5	5	5	..
Hobbs,	"	5	27	5	5	5	..
Lotus,	"	6	29	6	..	6	..
Deatsville,	"	6	31	6	6	6	..
Samuels,	"	6	33	6	6	6	..
Hunters,	"	6	36	6	..	6	..
Bourbon,	"	6	37	6	..	6	..
Nazareth,	"	6	37	6	..	6	..
Withrow,	"	6	38	6	..	6	..
Bardstown,	"	6	39	6	6	6	..
Eminence,	"	6	40	6	6	6	..
Early Times,	"	7	42	7	6	6	1
Athertonville,	"	7	44	7	..	7	..
Greenbrier,	"	7	45	7	5	5	2
Gethsemane,	"	7	48	7	6	6	1
New Hope,	"	7	50	7	..	7	..
Willow Springs,	"	7	51	7	..	7	..
Coon Hollow,	"	7	52	7	7	7	..
Dants,	"	7	53	7	..	7	..
Chicago,	"	7	55	7	7	7	..
Loretto,	"	7	57	7	7	7	..
Bloomfield,	"	6	57	6	..	6	..
St. Mary's,	**"**	**8**	**62**	**8**	**7**	**7**	**1**
Lebanon.	**"**	**8**	**67**	**8**	**7**	**7**	**1**

Dants,	"	7	33	7	..	7	..
Chicago,	"	7	35	7	7	7	..
Loretto,	"	7	34	7	7	7	..
Bloomfield,	"	6	37	6	..	6	..
St. Mary's,	"	8	62	8	7	7	1
Lebanon,	"	8	67	8	7	7	1
Jetts,	"	7	71	7	..	7	..
Calvary,	"	11	73	11	..	11	..
Campbellsville,	"	11	87	11	..	11	..
Silver Springs,	"	7½	88	7½	..	7½	..
Crab Orchard,	"	10	115	10	..	10	..
Kiserton,	"	10	118	10	..	10	..
Memphis Junction,	"	10	118	10	..	10	..
Shawhan,	"	10	120	10	..	10	..
Lair,	"	10	124	10	..	10	..
Cynthiana,	"	10	127	10	..	10	..
Kellers,	"	10	129	10	..	10	..
Poindexter,	"	10	131	10	..	10	..
Garnett,	"	10	133	10	..	10	..
Robinson,	"	10	136	10	..	10	..
Berry,	"	11	139	11	..	11	..
Boyd,	"	11	141	11	..	11	..
Morgan,	"	11	146	11	..	11	..
Levingood,	"	11	149	11	..	11	..
Falmouth,	"	11	153	11	..	11	..
Silver Creek,	"	10	161	10	10	10	..
Lancaster,	"	10	177	10	..	10	..
Gilbert,	"	11	180	11	..	11	..
Haden,	"	11	183	11	..	11	..

Barrel and Box Material, K. D., L. C. L., per 100 lbs.

Chapeze,	Ky.	13	24	13	13	13	..
Clermont,	"	13	25	13	13	13	..
Hobbs,	"	13	27	13	13	13	..
Lotus,	"	15	29	15	..	15	..
Deatsville,	"	15	31	15	15	15	..
Samuels,	"	15	33	15	15	15	..
Hunters,	"	15	36	15	..	15	..
Bourbon,	"	15	37	15	..	15	..
Nazareth,	"	15	37	15	..	15	..
Withrow,	"	15	38	15	..	15	..
Bardstown,	"	15	39	15	15	15	..
Eminence,	"	17	40	17	15	15	2
Early Times,	"	21	42	21	15	15	6
Athertonville,	"	21	44	21	..	21	..
Greenbrier,	"	21	45	21	15	15	6
Gethsemane,	"	21	48	21	15	15	6
New Hope,	"	21	50	21	..	21	..
Willow Springs,	"	22	51	22	..	22	..
Green Hollow,	"	22	52	22	15	15	7
Dants,	"	22	33	22	..	22	..
Chicago,	"	22	35	22	15	15	7
Loretto,	"	23	34	23	15	15	8
Bloomfield,	"	17	37	17	..	17	..
St. Mary's,	"	24	62	24	15	15	9
Lebanon,	"	26	67	26	15	15	11
Jetts,	"	15	71	15	..	15	..
Calvary,	"	31	73	31	..	31	..
Campbellsville,	"	31	87	31	..	31	..
Silver Springs,	"	17	88	17	..	17	..
Crab Orchard,	"	30	115	30	..	30	..
Kiserton,	"	18	118	18	..	18	..
Memphis Junction,	"	30	118	30	..	30	..
Shawhan,	"	18	120	18	..	18	..
Lair,	"	19	124	19	..	19	..
Cynthiana,	"	19	127	19	..	19	..
Kellers,	"	19	129	19	..	19	..
Poindexter,	"	20	131	20	..	20	..
Garnett,	"	21	133	21	..	21	..
Robinson,	"	21	136	21	..	21	..
Berry,	"	21	139	21	..	21	..
Boyd,	"	21	141	21	..	21	..
Morgan,	"	22	146	22	..	22	..
Levingood,	"	22	149	22	..	22	..
Falmouth,	"	22	153	22	..	22	..
Silver Creek,	"	19	161	19	19	19	..
Lancaster,	"	22	177	22	..	22	..
Gilbert,	"	22	180	22	..	22	..
Haden,	"	22	183	22	..	22	..

Authority: L. & N. R. R. Louisville Local Tarif- No. 1, I. C. C. No. A-11282.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points (not on L. & N. R. R.) north of Ohio river.	Distance.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission's order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission's order.
Barrels, empty, minimum 120 bbls., C. L. (estimated weight 60 lbs. per bbl.).							
Chapeze,	Ky.	7.8 Min., 10,000 lbs.	24	7.8 Min., 10,000 lbs.	9	7.8	..
Clermont,	"	7.8 "	25	7.8 "	9	7.8	..
Hobbs,	"	7.8 "	27	7.8 "	9	7.8	..
Lotus,	"	9. "	29	9. "	..	9	..
Deatsville,	"	9 "	31	9 "	9	9	..
Samuels,	"	9 "	33	9 "	9	9	..
Hunters,	"	9 "	36	9 "	..	9	..
Bourbon,	"	9 "	37	9 "	..	9	..
Nazareth,	"	9 "	37	9 "	..	9	..
Withrow,	"	9 "	38	9 "	..	9	..
Bardstown,	"	9 "	39	9 "	14	9	..
Eminence,	"	10.2 "	40	10.2 "	10	10	..
Early Times,	"	12.6 "	42	12.6 "	9	9	3.6
Athertonville,	"	12.6 "	44	12.6 "	..	12.6	..
Greenbrier,	"	12.6 "	45	12.6 "	9	9	3.6
Gethsemane,	"	12.6 "	48	12.6 "	10	10	2.6
New Hope,	"	12.6 "	50	12.6 "	..	12.6	..
Willow Springs,	"	13.2 "	51	13.2 "	..	13.2	..
Coon Hollow,	"	13.2 "	52	13.2 "	10	10	3.2
Dants,	"	13.2 "	53	13.2 "	..	13.2	..
Chicago,	"	13.2 "	55	13.2 "	10	10	3.2
Loretto,	"	13.8 "	57	13.8 "	10	10	3.8
Bloomfield,	"	10.2 "	57	10.2 "	..	10.2	..
St. Marys,	"	14.4 "	62	14.4 "	10	10	4.4
Lebanon,	"	15.6 "	67	15.6 "	10	10	5.6
Jetts,	"	10 Min., 120 bbls.	71	10 Min., 120 bbls.	..	10	..
Calvary,	"	18.6 " 10,000 lbs.	73	18.6 " 10,000 lbs.	..	18.6	..
Campbellsville,	"	18.6 "	87	18.6 "	..	18.6	..
Silver Springs,	"	10.2 "	88	10.2 "	..	10.2	..
Crab Orchard.	"	18 "	115	18 "	..	18	..

Calvary,	"	18.6	" 10,000 lbs.	73	18.6	" 10,000 lbs.	..	18.6	..
Campbellsville,	"	18.6	"	87	18.6	"	..	18.6	..
Silver Springs,	"	10.2	"	88	10.2	"	..	10.2	..
Crab Orchard,	"	18	"	115	18	"	..	18	..
Kiserton,	"	10.8	"	118	10.8	"	..	10.8	..
Memphis Jct.,	"	18	"	118	18	"	..	18	..
Shawhan,	"	10.8	"	120	10.8	"	..	10.8	..
Lair,	"	11.4	"	124	11.4	"	..	11.4	..
Cynthiana,	"	11.4	"	127	11.4	"	..	11.4	..
Kellers,	"	11.4	"	129	11.4	"	..	11.4	..
Poindexter,	"	12	"	131	12	"	..	12	..
Garnett,	"	12.6	"	133	12.6	"	..	12.6	..
Robinson,	"	12.6	"	136	12.6	"	..	12.6	..
Berry,	"	12.6	"	139	12.6	"	..	12.6	..
Boyd,	"	12.6	"	141	12.6	"	..	12.6	..
Morgan,	"	13.2	"	146	13.2	"	..	13.2	..
Levingood,	"	13.2	"	149	13.2	"	..	13.2	..
Falmouth,	"	13.2	"	153	13.2	"	..	13.2	..
Silver Creek,	"	11.4	"	161	11.4	"	12	11.4	..
Lancaster,	"	13.2	"	177	13.2	"	..	13.2	..
Gilbert,	"	13.2	"	180	13.2	"	..	13.2	..
Haden,	"	13.2	"	183	13.2	"	..	13.2	..

Bottle Caps, metal, any quantity, per 100 pounds.

Chapeze,	Ky.	20	24	20	20	20	..
Clermont,	"	20	25	20	20	20	..
Hobbs,	"	20	27	20	23	20	..
Lotus,	"	23	29	23	..	23	..
Deatsville,	"	23	31	23	23	23	..
Samuels,	"	23	33	23	23	23	..
Hunters,	"	23	36	23	..	23	..
Bourbon,	"	23	37	23	..	23	..
Nazareth,	"	23	37	23	..	23	..
Withrow,	"	23	38	23	..	23	..
Bardstown,	"	23	39	23	23	23	..
Eminence,	"	25	40	25	25	25	..
Early Times,	"	30	42	30	23	23	7
Athertonville,	"	30	44	30	..	..	..
Greenbrier,	"	30	45	30	23	23	7
Gethsemane,	"	30	48	30	26	26	4
New Hope,	"	30	50	30	..	30	..
Willow Springs,	"	32	51	32	..	32	..
Coon Hollow,	"	32	52	32	26	26	6
Dants,	"	32	53	32	..	32	..
Chicago,	"	32	55	32	26	26	6
Loretto,	"	34	57	34	26	26	8
Bloomfield,	"	25	57	25	..	25	..
St. Marys,	"	35	62	35	26	26	9
Lebanon,	"	39	67	39	26	26	13
Jetts,	"	27	71	27	..	27	..
Calvary,	"	48	73	48	..	48	..
Campbellsville,	"	48	87	48	..	48	..
Silver Springs,	"	27	88	27	..	27	..
Crab Orchard,	"	45	115	45	..	45	..
Kiserton,	"	33	118	33	..	33	..
Memphis Jct.,	"	47	118	47	..	47	..
Shawhan,	"	34	120	34	..	34	..
Lair,	"	35	124	35	..	35	..
Cynthiana,	"	35	127	35	..	35	..
Kellers,	"	35	129	35	..	35	..
Poindexter,	"	36	131	36	..	36	..
Garnett,	"	37	133	37	..	37	..
Robinson,	"	37	136	37	..	37	..
Berry,	"	38	139	38	..	38	..
Boyd,	"	38	141	38	..	38	..
Morgan,	"	40	146	40	..	40	..
Levingood,	"	40	149	40	..	40	..
Falmouth,	"	40	153	40	..	40	..
Silver Creek,	"	35	161	35	35	35	..
Lancaster,	"	35	177	35	..	35	..
Gilbert,	"	35	180	35	..	35	..
Haden,	"	35	183	35	..	35	..

Authority: Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective—Interstate, January 23, 1910.
Intrastate, December 31, 1909.

STATEMENT 4, SHEET 3.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points (not on L. & N. R. R.) north of Ohio river.	Distance.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission's order.	Differences in favor of intrastate traffic and against interstate traffic created by State commission's order.
Bottle Covers, paper or straw, packed or pressed in bales, C. L., minimum 15,000 pounds, per 100 pounds.							
		Min. wt., 24,000 pounds.		Min. wt., 24,000 pounds.			
Chapeze,	Ky.	13	24	13	13	13	..
Clermont,	Ky.	13	25	13	13	13	..
Hobbs,	"	13	27	13	15	13	..
Lotus,	"	15	29	15	..	15	..
Deatsville,	"	15	31	15	15	15	..
Samuels,	"	15	33	15	15	15	..
Hunters,	"	15	36	15	..	15	..
Bourbon,	"	15	37	15	..	15	..
Nazareth,	"	15	37	15	..	15	..
Withrow,	"	15	38	15	..	15	..
Bardstown,	"	15	39	15	15	15	..
Eminence,	"	17	40	17	17	17	..
Early Times,	"	21	42	21	15	15	6
Athertonville,	"	21	44	21	..	21	..
Greenbrier,	"	21	45	21	15	15	6
Gethsemane,	"	21	48	21	15	15	6
New Hope,	"	21	50	21	..	21	..
Willow Springs,	"	22	51	22	..	22	..
Coon Hollow,	"	22	52	22	15	15	7
Dants,	"	22	53	22	..	22	..
Chicago,	"	23	55	23	15	15	7
Loretto,	"	17	57	23	15	15	8
Bloomfield,	"	24	62	17	..	17	..
St. Marys,	"	26	67	24	15	15	9
Lebanon,	"	17	71	26	15	15	11
Jetts,	"	31	73	17	..	17	..
Calvary,	**"**			31	..	31	..
Campbellsville,	**"**						

Jetts,	"	17	71	17	..	17	..
Calvary,	"	31	73	31	..	31	..
Campbellsville,	"	31	87	31	..	31	..
Silver Springs,	"	17	88	17	..	17	..
Crab Orchard,	"	30	115	30	..	30	..
Kiserton,	"	18	118	18	..	18	..
Memphis Jct.,	"	30	118	30	..	30	..
Shawhan,	"	18	120	18	..	18	..
Lair,	"	19	124	19	..	19	..
Cynthiana,	"	19	127	19	..	19	..
Kellers,	"	19	129	19	..	19	..
Poindexter,	"	20	131	20	..	20	..
Garnett,	"	21	133	21	..	21	..
Robinson,	"	21	136	21	..	21	..
Berry,	"	21	139	21	..	21	..
Boyd,	"	21	141	21	..	21	..
Morgan,	"	22	146	22	..	22	..
Levingood,	"	22	149	22	..	22	..
Falmouth,	"	22	153	22	..	22	..
Silver Creek,	"	19	161	19	19	19	..
Lancaster,	"	22	177	22	..	22	..
Gilbert,	"	22	180	22	..	22	..
Haden,	"	23	183	22	..	22	..

Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 pounds.

Chapeze,	Ky.	15	24	15	15	15	..
Clermont,	"	15	25	15	15	15	..
Hobbs,	"	15	25	15	15	15	..
Lotus,	"	17	29	17	..	17	..
Deatsville,	"	17	31	17	17	17	..
Samuels,	"	17	33	17	20	17	..
Hunters,	"	17	36	17	..	17	..
Bourbon,	"	17	37	17	..	17	..
Nazareth,	"	17	37	17	..	17	..
Withrow,	"	17	38	17	..	17	..
Bardstown,	"	17	39	17	17	17	..
Eminence,	"	19	40	19	19	19	..
Early Times,	"	20	42	20	20	20	3
Athertonville,	"	20	44	20	..	20	3
Greenbrier,	"	20	45	20	20	20	3
Gethsemane,	"	20	48	20	20	20	..
New Hope,	"	20	50	20	..	20	..
Willow Springs,	"	20	51	20	20	20	2
Coon Hollow,	"	20	52	20	20	20	..
Dants,	"	20	53	20	20	20	3
Chicago,	"	20	57	20	20	20	..
Loretto,	"	20	57	20	20	20	..
Bloomfield,	"	20	58	20	20	20	8
St. Marys,	"	20	62	20	20	20	..
Lebanon,	"	21	71	21	..	21	..
Jetts,	"	21	73	21	..	21	..
Calvary,	"	21	87	21	..	21	..
Campbellsville,	"	21	88	21	..	21	..
Silver Springs,	"	21	115	21	..	21	..
Crab Orchard,	"	21	118	21	..	21	..
Kiserton,	"	21	118	21	..	21	..
Memphis Jct.,	"	21	120	21	..	21	..
Shawhan,	"	21	124	21	..	21	..
Lair,	"	21	127	21	..	21	..
Cynthiana,	"	21	129	21	..	21	..
Kellers,	"	21	131	21	..	21	..
Poindexter,	"	21	133	21	..	21	..
Garnett,	"	21	136	21	..	21	..
Robinson,	"	21	139	21	..	21	..
Berry,	"	21	141	21	..	21	..
Boyd,	"	21	146	21	..	21	..
Morgan,	"	21	149	21	..	21	..
Levingood,	"	21	153	21	..	21	..
Falmouth,	"	21	161	21	31	21	..
Silver Creek,	"	21	177	21	..	21	..
Lancaster,	"	21	180	21	..	21	..
Gilbert,	"	21	183	21	..	21	..
Haden,	"	25	183	25	..	25	..

Authority: L. & N. R. R. Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective, intrastate, Dec. 31, 1909; interstate, Jan. 23, 1910.

knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

W. L. MAPOTHER.

Subscribed and sworn to before me this the 11th day of January, 1911.

In witness whereof, I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My Commission expires on January 4, 1914.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

(Endorsement:) Lodged with us Jan'y 12, 1911. Denison, D. J. Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The tables filed with 2nd Amended Bill and marked "Statement No. 1," "Statement No. 2," "Statement No. 3," and "Statement No. 4" are as follows, viz:

(Here follow tables marked pages 189 to 204, inclusive.)

205 On the same day, to wit: on the 12th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures, as follows, viz:

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, *January* 12, 1911.

Court met pursuant to adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911 and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered,

It is ordered, that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted,

It is further ordered, that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

206 1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the commission order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further order of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of $10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order,—unless defendants should make it appear to this court that condition 1, 2 or 4 has not been performed within such thirty days.

207 On a day following, to wit: on the 6th day of February, A. D., 1911, the following order was made and entered herein, which said order is in words and figures as follows, viz:

Court met pursuant to adjournment.

Present: Honorable Henry F. Severens, Circuit Judge.

No. 686.

Louisville & Nashville Railroad Company, Complainant,

v.

Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This day came the complainant, Louisville & Nashville Railroad Company, and in accordance with the terms of the order entered herein January 12, 1911, filed in court its written statement, signed by Chas. Haydon, Comptroller, showing amounts paid by various consignees and shippers named therein on distillers' supplies, etc., on shipments moving from August 10th, to December 31st, 1910, inclusive, in excess of amounts they would have paid had shipments been charged for on basis of rates as fixed by the Kentucky Railroad Commission's order of August 10th, 1910, the several amounts aggregating for said period the sum of $6,248.49, which was paid into court by the draft of said Comptroller to C. N. Wiard, Clerk of this Court on W. W. Thompson, Treasurer of said Company, which amount the Clerk is ordered to hold, subject to the further order of the Court herein.

The written statement this day filed and referred to in the foregoing order is in words and figures as follows, to wit:

Louisville and Nashville Railroad Company.

Statement showing amounts paid by various consignees and shippers named below on distillers' supplies, etc., on shipments moving from August 10th to December 31st, 1910, inclusive, in excess of amount they would have paid had shipments been charged for on basis of rates as fixed by the Kentucky R. R. Commis-
208 sion's order of August 10th, 1910.

Consignee or shipper.	Address of consignee or shipper and destination.	Amount.
J. M. Atherton & Co.	Coon Hollow	$29.82
M. C. Beam & Co.	Gethsemane	266.73
T. J. Beam	Bardstown	1.39
Bourbon Prince Co.	"	.10
Blair Osbourne & Ballard Dist. Co.	Chicago	68.32
Burk Spring Dist. Co.	Loretto	322.50
Chas. Boldt Glass Co.	Louisville	.20
Brown Foreman Dist. Co.	St. Mary's	366.21
Big Spring Dist. Co.	Coon Hollow	8.41
Coon Hollow Dist. Co.	" "	100.31
R. Cummings & Co.	Loretto	348.75
J. R. Crume	Bardstown	.09
J. B. Dant & Sons	Gethsemane	1.68
H. Ehrman & Co., c/o F. G. Walker	Bardstown	2.84
Eminence Milling Co.	Eminence	21.60
Eminence Dist. Co.	"	410.18
Early Times Dist. Co.	Early Times	579.05
S. Grabfelder	Clermont	20.88
Mose Grabfelder	"	401.91
Greenbrier Dist. Co.	Greenbrier	502.36
Herman Bros.	Louisville	2.07
Helmar Ehrman & Co.	"	1.31
Head & Parker	Gethsemane	134.65
Hume Dist. Co.	Silver Creek	8.09
W. S. Hume & Co.	" "	142.58
W. H. Head Dist. Co.	Chicago	11.29
Moore & Reardon	Bardstown	.52
Murphy Barber & Co.	Clermont	1.45
Mueller Wathen & Kobert	Lebanon	840.97
Tom Moore Dist Co.	Bardstown	60.24
Nelson Co. Liquor Co.	"	1.08
209 Nelson Co. Dist. Co.	Coon Hollow	294.24
Old Saxon Dist. Co.	Chicago	11.44
Old Charter Dist. Co.	Chapeze	17.43
Old Grandad Dist. Co.	Hobbs	60.83
Progress Dist. Co.	Louisville	.50
Paul Jones & Co.	"	2.92
W. B. Samuels & Co.	Samuels	.63
T. W. Samuels Dist.	Deatsville	71.82

Smith Dist. Co.	Chicago	36.19
H. Sutherland & Co.	Bardstown	37.89
C. T. Stewart	"	.19
Frank H. Seubold	Louisville	.57
Taylor & Williams	Gethsemane	438.45
B. Terhune & Sons	Lebanon	14.40
F. G. Walker	Bardstown	5.93
Wright & Taylor	Chapeze	324.79
Warwick Dist. Co.	Silver Creek	32.78
Jno. C. Weller & Co.	Loretto	25.78
Willow Springs Dist.	Coon Hollow	214.13
Total		$6,248.49

Correct:

CHAS. HAYDON,
Comptroller.

The foregoing Statement is endorsed in words and figures as follows, viz:—Filed Feb. 6, 1911, Chas. N. Wiard, Clerk.

On the same day to wit, on the 6th day of February, A. D., 1911, Special Bond required by the order herein of date January 12, 1911, was executed and approved, which said bond is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

210 No. 686.

Louisville & Nashville Railroad Company, Appellant,
vs.
Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Special Bond.

Know all men by these presents: That the undersigned, Louisville & Nashville Railroad Company, as principal, and its surety, The Citizens Trust & Guaranty Company, of West Virginia, a corporation duly incorporated and organized under the laws of said State, and authorized and empowered to become surety on all bonds in judicial proceedings, and to transact business in that State, and in the States of Ohio and Kentucky, are held and firmly bound unto the United States for the use of such parties as the Court may direct, in the above styled cause, in the penalty of Ten Thousand ($10,000) Dollars, to be paid to such parties as the Court may direct, and bind themselves, their successors and assigns, by these presents. Sealed with the official seals of said companies, and dated February 6, 1911.

Whereas, The complainant, Louisville & Nashville Railroad Company, in the above styled suit, has prosecuted an appeal against the defendants therein to the Supreme Court of the United States to reverse the order rendered and entered in said cause on January 12, 1911; and

Whereas, in paragraph 3 of said order, the Court directed and required the complainant, the Louisville & Nashville Railroad Company, in said cause, thereafter, and on the 15th of each month, commencing February 15, 1911, to file a statement, covering the preceding calendar month, of all freight charges received by it in excess of the rates fixed by the order of the Railroad Commission of Kentucky, dated August 10, 1910, and fully described in said suit, and to pay into court the amount of such excess charges for each of such calendar months, such statements to also show the names and addresses of all parties paying such excess, and such monthly statements and payments to be continued until the further order of the court or the Supreme Court of the United States.

211 Now, therefore, the condition of this obligation is such that, if the said complainant shall file said monthly statements and pay the amounts of such excess charges into court, as directed and required by paragraph 3 of the order aforesaid, until the further order of the court or of the Supreme Court in said cause, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY.
By W. L. MAPOTHER, *First Vice President.*

Attest:
J. H. ELLIS, *Secretary.*

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA.
By LEONARD L. HARDING, *Att'y-in-Fact.*

The foregoing bond is approved and filed, this February 6, 1911.
CHAS. N. WIARD, *Clerk.*

The foregoing bond is endorsed in words and figures as follows, viz:—Filed Feb'y 6, 1911. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D. 1911, Petition for Appeal was filed herein, which said Petition is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Petition for Appeal to the Supreme Court of the United States.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

Your petitioner, the Louisville & Nashville Railroad Company, complainant and appellant in the above styled cause, conceiving itself aggrieved by the order of this Court, rendered January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against the said defendants and ap-
212 pellees herein, does hereby appeal from said order to the Supreme Court of the United States, in accordance with the provisions of Section Seventeen (17) of the Act of the Congress of the United States, entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June 18, 1910, for the reasons and upon the grounds specified in its Assignment of Errors, presented and filed herewith.

Wherefore, your petitioner prays for an order allowing its said appeal, and that a transcript of the record and proceedings, upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, as prescribed by law.

February 6, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant, Louisville & Nashville Railroad Company.

The foregoing petition is endorsed in words and figures as follows, viz:—Lodged with me this 6th day of February, 1911. H. F. Severens, Circuit Judge. Filed Feb'y 6, 1911. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D. 1911, an Assignment of Errors was filed herein, which is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Assignment of Errors.

And now on this, the 6th day of February, 1911, comes the complainant and appellant, Louisville & Nashville Railroad Com-
213 pany, by William G. Dearing, Albert S. Brandeis and Henry L. Stone, its counsel, and says that in the order rendered by the Court in the above entitled cause on January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against said defendants and appellees, in accordance with the prayer of its original bill and the terms and provisions of the restraining order granted September 7, 1910, upon the filing of its said bill herein, and in the record and proceedings in said cause in this court, there is manifest error as set forth in this, its Assignment of Errors, which is presented and filed simultaneously with its Petition for Appeal, and this Court erred in denying its said application and motion, as follows:

I.

In not granting its said application and motion for an interlocutory injunction, because the McChord Act of the Legislature of Kentucky, approved March 10, 1900, entitled "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions," and the order of August 10, 1910, made by appellees in pursuance of said Act, herein complained of, are violative of the provision of Section One (1) of Article XIV of the Amendments to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and because the enforcement of said order of August 10, 1910, unless enjoined herein, will operate to deprive complainant and appellant of its property without due process of law.

II.

In not granting its said application and motion for an interlocutory injunction, because said McChord Act and said order of
214 August 10, 1910, herein complained of, are violative of the provision of Section One (1) of said Article of the Amend-

ments to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws, and because the enforcement of said order of the appellees will operate to deny to the appellant the equal protection of the laws.

III.

In denying the said application and motion for an interlocutory injunction on the ground that the appellant cannot invoke the guaranty of the due process clause of the Federal Constitution, or claim that it is violated by the rate order of August 10, 1910, herein complained of, unless it avers and proves that the reduced rates fixed thereby are confiscatory—that is to say, would not yield to it, for the service performed, any profit, or that its entire business would not do so, although it is averred in the bill as amended, and proven by the affidavits filed in support thereof, that the reduced rates prescribed by said order are arbitrary, unjust, unreasonable, discriminatory and will not yield to it a fair or reasonable compensation for the service performed, and will deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to such service or the public use, with respect to the intrastate traffic involved or carried under the rates thus prescribed.

IV.

In denying said application and motion for an interlocutory injunction on the ground that appellant was not entitled to any judicial review of said rate-making order of the Railroad Commission, to avoid violation of the guaranty of due process provided in the Federal Constitution; that the notice and hearing before said Commission, as provided in the "McChord Act," was all it was lawfully entitled to; and that the order of August 10, 1910,
215 herein complained of, reducing its rates, after such notice and hearing, became (at the expiration of ten days from the mailing of a copy of such order to a representative of the appellant) final, conclusive and of full force and effect.

V.

In not holding the excessive and burdensome penalty provisions of the "McChord Act" are unconstitutional on their face, under the due process and equal protection clauses of the Federal Constitution, and Section 17, of the Constitution of Kentucky, and the order of August 10, 1910, made by the Railroad Commission under said Act, void and unenforcible, and in not granting, on that ground, the application and motion of appellant for an interlocutory injunction against the appellees, enjoining them from enforcing their said order by indictments and prosecutions to recover the penalties provided by said Act, without regard to the insufficiency of the rates prescribed by said order, and notwithstanding the affidavits of two out of three of the members of said Commission dis-

avowing their present purpose to try to enforce said order by criminal proceedings or through the penalties provided in said Act, at least until the validity of said order has been passed upon in a civil suit, when it is their sworn official and statutory duty to institute and prosecute such criminal proceedings against appellant, its officers, agents and employés, for any and all violations of said order

VI.

In holding that appellant is not entitled to complain of the McChord Act on account of the provisions thereof with respect to fines and penalties, where it cannot aver and maintain that the rates prescribed by the Commission's said order are confiscatory.

VII.

In not holding the order complained of is invalid and void because the said Commission is without power or authority (as by said order it undertook to do) to prescribe for observance by appellant rates which are less than the maximum rates it is authorized and empowered to charge and collect by its legislative charter, which charter provision has not been repealed, and constitutes a con-
216 tract between it and the State of Kentucky; and in not holding, on that account, the said order operates to deprive appellant of its property in violation of the due process clause of the Federal Constitution; and also operates to impair the obligation of such contract in violation of the contract clause of Section Ten (10) Article One (1) of the Federal Constitution.

VIII.

In not holding the said "McChord Act" unconstitutional and said rate order of August 10, 1910, void, because said Act undertakes to confer upon the Railroad Commission, an administrative or ministerial body, judicial power and the authority of a court, as well as legislative powers, over and concerning the rates of railroad carriers, and to deprive such carriers of their rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed by said Commission, in violation of the provisions of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the making and promulgation of its said order herein complained of; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said Act and order on that ground.

IX.

In not granting appellant's application and motion for an interlocutory injunction against appellees, as constituting the Railroad

Commission of Kentucky, enjoining them from proceeding to enforce their said rate-making order of August 10, 1910, because said order is arbitrary and void, having been made when no testimony or evidence had been adduced at the hearing or investigation in the proceeding before said Commission, in which said order was
217 entered and promulgated, which established or tended to establish that any of the rates of appellant, which were effective March 25, 1910, and that have been since that date charged, collected and received by it for transportation services on the commodities and between the points named in said order, were or are unjust, unreasonable or extortionate; and because there was no evidence whatsoever introduced in said hearing or investigation or considered by said Commission, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be thereafter charged, collected or received by appellant for the transportation of the commodities from the points of origin to the points of destination named in said order, and the subject-matter of the justness or reasonableness of rates for such transportation of said commodities between said points for all purposes and without regard to the use to which they were to be applied, was coram non judice said Commission at said hearing and investigation, all of which is specifically alleged in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

X.

In not granting appellant's application and motion for an interlocutory injunction enjoining the enforcement by appellees, as constituting said Commission, of their order awarding so-called reparation in sundry sums to the parties, respectively, named in said order dated August 10, 1910, and enjoining the appellee, Adam T. Siler, as the Chairman of said Commission, from filing a certified copy of said order for such reparation in the office of the clerk of the circuit court of any county into or through which run the line or lines of road owned or operated by appellant carrying the freight, as to which the said award of reparation in said order was made, or any other county within the State of Kentucky, on the ground that said order is arbitrary and void, no evidence having been heard or introduced in said investigation, when considered by said Commis-
218 sion showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from appellant on account of previous payment by them, or any of them, of alleged unjust, or unreasonable or extortionate rates, all of which is averred in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

XI.

In not granting appellant's application and motion for an interlocutory injunction, as stated in Paragraph No. X of this Assign-

ment of Errors, and as prayed for in its bill, because there is no valid statute of the State of Kentucky granting power or authority to said Commission to make, promulgate or enforce the said order awarding reparation to the parties instituting the proceeding before it in which said order was entered, Section 829, Kentucky Statutes (the only statutory provision bearing on the subject of reparation) not being applicable to said proceeding under the said "McChord Act," and, if it were, it is unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein, with respect to the trial in the circuit court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

XII.

In not holding that the "McChord Act" constitutes an abandonment by the State of Kentucky of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over and con-
219 cerning the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and, therefore, void.

XIII.

In not holding that the rate-making order of August 10, 1910, herein complained of, violated the provision of Section 817, Kentucky Statutes, against unjust discrimination, and that complainant cannot obey said order with respect to the 16 distillery stations, constituting the destinations of the commodities named in said order, out of the 48 distillery stations in all on its lines in Kentucky, without violating the provisions of that section and creating an unjust discrimination, as alleged in its second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XIV.

In not holding that the said order of the Railroad Commission violated the provisions of Section 818, Kentucky Statutes, against making or giving an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, and against subjecting any person, company, firm, cor-

poration or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, the facts showing such undue or unreasonable preference or advantage, and such undue or unreasonable prejudice or disadvantage, being alleged in appellant's second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order

XV.

In not holding that the said rate-making order of the Railroad Commission in its operation and enforcement directly, immediately and necessarily interferes with, affects and compels reductions in complainant's existing legal, just and reasonable rates in force March 25, 1910, and ever since, covered by its tariffs published and on file with the Interstate Commerce Commission, on the same commodities, shipped in the same quantities, to the same points of destination on appellant's lines in Kentucky, as stated and set out in said order, from Cincinnati, Ohio, and other points of origin outside of Kentucky, thus resulting in an annual loss, as alleged in the original bill, to appellant on interstate shipments to the 16 distillery stations named in said order of, at least, $3,000, and on intrastate shipments to the same stations of $15,600; and upon the application of the reduced rates prescribed by said order to the shipments of such commodities to the other 32 distillery stations on appellant's lines in Kentucky, resulting in an additional annual loss of, at least, $54,000, one-half of which would be on interstate shipments and the other half on intrastate shipments thereto, as alleged in appellant's second amended bill, and not controverted by answer or otherwise; and in not holding that said order is illegal and void, because in its operation and enforcement it would substantially, directly and necessarily burden and regulate interstate commerce, hamper and prevent the enforcement of the Act to regulate commerce, and compel appellant to abandon or surrender the rights which it has under the Constitution and laws of the United States, and place appellant in such a position it cannot enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey the provisions of said order, all in violation of the commerce clause of the Federal Constitution, the facts showing which are specifically averred in appellant's bill as amended, and not denied or controverted by answer or otherwise, but admitted by appellees' general demurrer; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said order on that ground.

XVI.

In not holding that said order of August 10, 1910, herein complained of, in its direct and necessary operation and effect upon the rates of appellant as a common carrier by railroad of interstate commerce violates Section 2 of the Act to regulate commerce which pro-

hibits unjust discriminations, and in not, on that ground, granting appellant's application and motion for an interlocutory injunction enjoining its enforcement.

XVII.

In not holding that said rate-making order of the Railroad Commission in its direct and necessary operation and effect upon the rates of appellant as an interstate common carrier by railroad, violates Section 3 of the Act to regulate commerce, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Wherefore, the appellant, Louisville & Nashville Railroad Company, prays that the order of the Circuit Court of the United States for the Eastern District of Kentucky, entered January 12, 1911, denying appellant's application and motion for an interlocutory injunction herein, be reversed, and that said Circuit Court be directed to grant said application and motion for an interlocutory injunction in accordance with the prayer of the original bill as amended, and substantially in the terms of the restraining order of September 7, 1910, issued upon the filing of the original bill.

February 6, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

The foregoing Assignment of Errors is endorsed in words and figures as follows, viz: Filed Feb'y 6, 1911, Chas. N. Wiard, Clerk.

222 On the same day, to wit: on the 6th day of February, A. D., 1911, the following Bond on Appeal was approved and filed herein, which is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Bond on Appeal.

Know all men by these presents: That the undersigned, The Citizens Trust & Guaranty Company, of West Virginia, a corporation duly incorporated and organized under the laws of said State, and

authorized and empowered to become surety on all bonds in judicial proceedings and to transact business in that State, and in the States of Kentucky and Ohio, is held and firmly bound unto Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, in the sum of One Thousand ($1,000) Dollars to be paid to the said Siler, Finn and Tarlton, and binds its successors and assigns, firmly by these presents.

Sealed with the official seal of said Company, and dated February 6, 1911.

Whereas, The appellant, Louisville & Nashville Railroad Company, in the above styled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered and entered in said cause and Court on January 12, 1911.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make said appeal good, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] LOUISVILLE AND NASHVILLE RAILROAD CO.,
By W. L. MAPOTHER, *First Vice-Pres.*

Attest:
F. H. ELLIS, *Secretary.*

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By LEONARD L. HARDING, *Attorney in Fact.*

223 The foregoing bond is approved, this February 6, 1911.
H. F. SEVERENS,
U. S. Circuit Judge.

Filed February 6, 1911.
CHAS. N. WIARD, *Clerk.*

On the same day, to wit: on the 6th day of February, A. D. 1911, there was filed with said Special Bond and Appeal Bond a Power of Attorney, which is in words and figures as follows, viz:—

Citizens Trust & Guaranty Company of West Virginia hereby constitutes and appoints Leonard L. Harding, of Cincinnati, Ohio, its attorney-in-fact, for the purpose of executing, on its behalf as surety, any supersedeas or appeal bonds, or other bonds which may be required to be given by the Louisville & Nashville Railroad Company in any legal proceedings in any of the courts of the State of Ohio, or State of Kentucky, or in the United States Courts in Ohio, or Kentucky, and it hereby ratifies and confirms the act of its said attorney in signing its corporate name to any such bonds as surety, to all intents and purposes the same as if such bonds had been signed by the Company's proper officers at its home office.

In witness whereof it has caused this instrument to be signed in its behalf by R. J. A. Boreman, its first vice-president, and its cor-

porate seal to be affixed and attested by J. H. Knapp, its secretary, this 2nd day of February, 1911.

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By R. J. A. BOREMAN, *First Vice-President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, to wit:

I, Marshall L. Brown, a Notary Public, in and for said county do certify that R. J. A. Boreman personally appeared before me in my said county, and, being by me duly sworn, did depose and say that he is the First Vice-President of Citizens' Trust & Guaranty
224 Company of West Virginia, the corporation described in the writing above bearing date the 2d day of February, 1911 authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said R. J. A. Boreman acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 2d day of February, 1911.

[SEAL.] MARSHALL L. BROWN,
Notary Public, Wood County, West Va.

My commission expires August 29, 1917.

The foregoing Power of Attorney is endorsed as follows, viz: Filed Feb'y 6, 1911, Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D., 1911, an order was made and entered herein, which said order is in words and figures as follows, viz:—

Present: Honorable Henry F. Severens, Circuit Judge.

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Order Granting Appeal.

The above named complainant, Louisville & Nashville Railroad Company, having prayed an appeal from the order denying its application and motion for an interlocutory injunction, in the above

styled cause, rendered by this Court on January 12, 1911, to the Supreme Court of the United States, and said complainant having presented and filed its Petition for Appeal, together with its Assignment of Errors, and an Appeal Bond and the Special Bond required by said order, which bonds have been duly approved:

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It is now ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record and proceedings upon which said order of January 12, 1911, was made, duly authenticated, be sent to the Supreme Court of the United States, as prescribed by law.

No citation need be issued, the same being waived by Honorable Edward W. Hines, of defendants' counsel, who also consented in open court that the foregoing and all other necessary orders made in perfecting the appeal above mentioned by complainant may be entered and signed, in the absence of Honorable John W. Warrington, Circuit Judge, by Honorable Henry F. Severens, Circuit Judge of the Sixth Circuit.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, Chas. N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing 224 pages and the above lines are a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein The Louisville & Nashville Railroad Company was complainant and A. T. Siler, Lawrence B. Finn and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, were defendants, as the same will appear on file and of record in my office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 10th day of February, A. D., 1911, and of the Independence of the United States the 135th year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 22,526. E. Kentucky C. C. U. S. Term No. 905. Louisville & Nashville Railroad Company, appellant, vs. Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting The Railroad Commission of Kentucky. Filed February 15th, 1911. File No. 22,526.

FILED.
MAR 10 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 9[redacted] 1023

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Appellant,*

vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - *Appellees.*

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Notice, Motion and Grounds of Appellant to Advance for Hearing.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

WM. G. DEARING,
Of Counsel.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellant*,

vs.

ADAM T. SILER, LAWRENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - - *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

NOTICE, MOTION AND GROUNDS OF APPELLANT TO ADVANCE FOR HEARING.

NOTICE.

To Honorable James Breathitt, Attorney-General of Kentucky, and Honorable Edward W. Hines, Counsel for Appellees:

Please take notice that the undersigned, as counsel for the appellant, will make a motion before the court at the opening of its session on Monday, March 13, 1911, at or about the hour of noon, or as soon thereafter as counsel

can be heard, to advance the above-styled case for hearing at the present term, or as soon as the other business of the court will permit, and in support of said motion will file and present to the court upon the submission of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon each of you. This March 2, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

Service of the above notice is accepted, and the motion to advance assented to. This March 2, 1911.

JAMES BREATHITT,
Attorney-General of Kentucky.
EDWARD W. HINES,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellant*,

vs.

ADAM T. SILER, LAWRENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - - *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION AND GROUNDS TO ADVANCE FOR HEARING.

And now comes the appellant and moves the court to advance this case for hearing at the present term, or as soon as the other business of the court will permit, on the following grounds, to-wit:

1. This suit in equity was instituted September 7, 1910, in the Circuit Court of the United States for the Eastern District of Kentucky against the appellees, individually and as constituting the Railroad Commission

of Kentucky, to enjoin the enforcement of certain orders, which said Commission entered August 10 and promulgated August 31, 1910, in a proceeding before said Commission, wherein the Greenbrier Distillery Company and twenty-two other corporations, organized and existing under the laws of Kentucky, and engaged in the manufacture and shipment of whiskey in that State, had filed a complaint against the appellant, Louisville & Nashville Railroad Company, under the provisions of an act of the Legislature of Kentucky, known as the "McChord Act," approved March 10, 1900, alleging, in substance, that appellant's rates charged and collected since March 25, 1910, for the transportation of corn, rye, barley, malt, and other distillers' supplies, over its lines in Kentucky from Louisville, Covington, and Newport, Kentucky, to sixteen points of destination in that State, at which distillery plants were located, were unjust, unreasonable, and extortionate, and praying that appellant's said existing rates be adjudged unjust, unreasonable, and extortionate, and that, in lieu thereof, said Commission fix just and reasonable rates, not higher than those in force prior to March 25, 1910, and award reparation to said distillery corporations for the amounts alleged to have been paid by them, respectively, after the latter date.

Said Commission held appellant's existing rates on said commodities extortionate, unjust, and unreasonable, and fixed reduced rates, in lieu thereof, for like services thereafter rendered, and awarded reparation to the plaintiffs in accordance with the prayer of their complaint.

Appellant sought to enjoin the enforcement of said orders on various grounds, involving Federal questions, set forth in its bill as amended, but chiefly because the provisions of said McChord Act violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; that the operation of said rate-making order substantially, directly, and necessarily burdens and regulates interstate commerce, hampers and prevents the enforcement of the Act to Regulate Commerce, and compels appellant to abandon or surrender its rights under the Constitution and laws of the United States, and places appellant in such a position it can not enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey said order; that said order in its direct and necessary operation and effect upon appellant's rates violates Section 2 of the Act to Regulate Commerce, which prohibits unjust discriminations, and Section 3 of the same act, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm or corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever; that the rates prescribed by said order were arbitrary, unjust, unreasonable, and discriminatory, and would not yield to appellant a fair or reasonable compensation for the service performed, and would deprive it, without due process of law, of the fair and reasonable return it is entitled to earn on the value

of the property it devotes to such service or the public use, with respect to the intrastate traffic involved.

2. Appellant for additional grounds for the injunction prayed for alleged the said McChord Act undertook to vest in said Railroad Commission, an administrative or ministerial body, judicial power and authority, as well as legislative powers, over and concerning railroad carriers and rates, and to deprive them of the rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed, in violation not only of said provisions of the Federal Constitution and laws, but of Sections 27, 28, 109, and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the promulgation of its said order.

3. Among others, practically all of the questions under the Federal and State Constitutions are made in this case that were made in the case of *Siler, et al.*, v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175-198, except the question on which this court affirmed the decree of the court below, without passing on the constitutional questions involved. On the margin of the report of that case the full text of the McChord Act is set forth.

4. The McChord Act was held to be unconstitutional by the Circuit Court of the United States for the District

of Kentucky (*Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 216), but its constitutionality was not passed on in the appeal in that case, it being held by this court that it had been prematurely brought. (*McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483.) It is important to all the railroad companies operating lines in Kentucky, as well as to the Railroad Commission, and the public who patronize said lines, that the validity of said act and said rate-making order be determined by this court in the present case as expeditiously as practicable.

5. Upon the filing of appellant's bill in the court below, a restraining order was granted against the appellees, as prayed for, enjoining the enforcement of the order of said Commission herein complained of until the further order of the court, and a day was set for the hearing of appellant's application for an interlocutory injunction. When that time was reached the District Judge, who granted the restraining order for certain reasons which he announced, declined to sit further in this case. Thereupon, one of the circuit judges of the Sixth Circuit was designated to sit therein, and it being suggested to him that Section 17 of the Commerce Court Act, approved June 18, 1910, applied to this case, he, in pursuance of the provisions of that section, called to his assistance to hear and determine appellant's application for an interlocutory injunction herein two district judges of the Sixth Circuit. Said section is as follows:

> That no interlocutory injunction suspending or restraining the enforcement, operation, or execution

of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any circuit court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, However, That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney-General of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such applica-

> tion for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practical day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Oral argument was heard November 3, 1910, and briefs subsequently filed on said application, and thereafter, on January 12, 1911, the said application, by order of the court below, was denied, but appellant was given 30 days in which to perfect its appeal to this court, as provided for by said section of the Act of June 18, 1910, and, meantime, the restraining order aforesaid (on certain terms and conditions, which were duly complied with), was continued in full force and effect during the pendency of this appeal. One of these conditions was that appellant should file a statement showing, and pay into court, subject to its further order, the amounts received by appellant from August 10, 1910, to January 1, 1911, in excess of the rates prescribed by said Commission, which aggregated $6,248.49, and also file a like statement and make like payment into court of the amount of such excess received by it for every month thereafter, beginning with January 1, 1911, pending this appeal, each of which monthly payments will amount to between $3,000 and $4,000.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Appellant.

WILLIAM G. DEARING,
Of Counsel.

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Office Supreme Court, U. S.
FILED.
OCT 9 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. ~~210~~. 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, -APPELLANT,

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, INDIVIDUALLY and as CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Appellant.

WM. G. DEARING,
Of Counsel.

COURIER-JOURNAL JOB PRINTING CO.

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Supreme Court of the United States

OCTOBER TERM, 1911.

No. 507.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - APPELLANT,

vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, INDIVIDUALLY and as CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This suit in equity was instituted by the appellant, Louisville & Nashville Railroad Company, a common carrier corporation organized and existing under the laws of the State of Kentucky, September 7, 1910, against the appellees, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of said State, to enjoin the enforcement of certain orders entered by said Commission, August 10, and promulgated August 31, 1910. These orders were made in a proceeding before the Commission, wherein

the Greenbrier Distillery Company and twenty-two other corporations, organized and existing under the laws of the State of Kentucky, and engaged in the manufacture and shipment of whiskey, had on May 30, 1910, filed a complaint against the appellant, under the provisions of the McChord Act, hereinafter referred to, alleging, in substance, that appellant's rates charged and collected since March 25, 1910, on its lines of railroad, on corn, rye, barley, malt, barrel and box material, empty barrels and boxes, bottles, bottle caps and covers, hoop iron, etc., when shown to have been used in the manufacture and shipment of whiskey from three points of origin, viz.: Louisville, Covington, and Newport, Kentucky, respectively, to sixteen points of destination, respectively, viz.: Bardstown, Chapeze, Chicago, Clermont, Coon Hollow, Deatsville, Early Times, Gethsemane, Greenbrier, Hobbs, Hunters, Lebanon, Loretto, St. Mary's, Samuel's, and Silver Creek, Kentucky, as shown by Exhibit A, filed with said complaint (Tr. 26), were unjust, unreasonable and extortionate; and alleging that appellant had since March 25, 1910, further received from said distillery corporations divers sums set out in their complaint in excess of just and reasonable rates, consisting of the differences between the rates charged and collected by appellant on said commodities from said three points to said sixteen points *prior* to that date and the rates charged and collected thereon by appellant *since* that date; and praying that appellant's said existing rates be adjudged by said Commission to be unjust, unreasonable and extortionate, that, in lieu thereof, the Commission fix just and reasonable rates, not higher than the rates in force prior to March 25, 1910, and award reparation to said distillery corporations for the amounts alleged to have been paid to appellant by them, respectively, after the latter date. (Tr.

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All the material allegations of the complaint in that proceeding were traversed by the answer of appellant therein, after its motion to strike from the complaint therein all matters relating to reparation, for want of authority to grant the same, had been overruled by the Commission. (Tr. 34-35.)

After a so-called investigation and hearing of the parties, the Commission by the orders complained of herein, granted the prayer of said distillery corporations in all respects, that is to say, the existing rates of appellant on said commodities between the points above mentioned were, without any evidence, as appellant alleges, held to be unjust, unreasonable and extortionate; the former rates were fixed as just and reasonable for like services in the transportation of said commodities, without regard to the uses they were to be put to by the consignees; and awards were made by way of reparation for the several amounts alleged to have been paid after March 25, 1910, in excess of the former rates.

The appellees, constituting the Railroad Commission, claim power and authority to make such orders as are herein complained of under the provisions of the Act of the Kentucky Legislature, commonly called the McChord Act, which is as follows:

> An Act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employe of said Company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

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Section 2. The circuit court of any county into or through which the line or lines of road carrying such passengers or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

Section 3. Prosecutions under this Act shall be by indictment.

Section 4. All prosecutions under this Act shall be commenced within two years after the offense shall have been committed.

Section 5. In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the Chairman of the Commission, approved by the Governor, the Auditor shall draw his warrant upon the treasurer for its payment.

Approved March 10, 1900.

The foregoing Act now constitutes Section 820a, Kentucky Statutes. (Carroll's Edition, 1909.)

By Section 209 of the present Constitution of Kentucky, adopted September 28, 1891, the Railroad Commission was established and provided for as follows:

A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three Commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each Superior Court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall remain in office during the term of the present Governor, and until their successors are elected, and qualified. At the regular election in eighteen hundred and

ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in Section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier, company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings, as in the case of judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor.

Prior to the adoption of the present Constitution, the then existing Commission had not been empowered by any constitutional or statutory provision to regulate or fix railroad rates, nor was there any attempt by the Legislature afterward to confer such power upon the Commission established by the Constitution until March 10, 1900, when the McChord Act was passed.

By this Act it will be observed the Legislature undertook, as appellant alleges (Pars. IV, V, VI, Tr. 3-11), to clothe the Commission, when complaint shall be made to it, or when it receives information or has reason to believe that any railroad company is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in Kentucky, with judicial, legislative and executive powers, in violation of Sections 27 and 28 of the State Constitution, which are as follows:

> Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> Section 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Sections 109 and 135 of the State Constitution also provide as follows:

> Section 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.
>
> Section 135. No courts, save those provided for in this Constitution, shall be established.

Appellant further alleges (Par. VI, Tr. 6-11), that the said Act undertakes to constitute the Commission an anomalous and unconstitutional body, which with respect to all proceedings or investigations before it concerning rates charged, collected, or received by railroad carriers of freight or passengers, occupies the attitude of complainant, judge, legislator, and prosecutor. In other words, it

may itself be the complainant, or act as the complainant's attorney; as judge, it may try all preliminary questions and then pass on the guilt or innocence of the railroad carrier accused of extortion; as legislator, it may make and fix the compensation of such carrier, thus found by it guilty of extortion, for like services thereafter rendered (without limit as to time); as informer, it may procure indictments by a grand jury for any disobedience by the carrier, or its officers, agents, or employes, of its legislative acts or orders prescribing rates for future services (whether those rates be just or unjust, reasonable or unreasonable); and as prosecutor, it may on the trial of such indictments have imposed in behalf of the State upon such carrier, officer, agent, or employe thus indicted the enormous fines and penalties imposed by the provisions of said Act for such disobedience.

Appellant further alleges that while under the provisions of the State Constitution above referred to, this Commission is not and cannot be a court, no appeal to any court or tribunal possessing judicial powers is allowed or provided for by the McChord Act or any other statute of Kentucky, in behalf of a railroad carrier, from any order of said Commission adjudging such carrier guilty of extortion, or making and fixing what it shall have determined to be a just and reasonable rate, toll, or compensation for such carrier to charge, collect, or receive for like services thereafter rendered, in lieu of the rate, toll, or compensation held by the Commission to be extortionate. In other words, no matter how just or reasonable the existing rate of such carrier may be, or how unjust, unreasonable, arbitrary, confiscatory, or discriminatory the rate fixed by the Commission in lieu thereof may be, its order declaring the former extortionate, and the latter just and reasonable, is by the provisions of the McChord Act made *final and conclusive*, or intended to be so by any

reasonable construction of said Act. In any prosecution by indictment in the circuit court having criminal jurisdiction, the severe fines and penalties imposed by the Act for disregarding the final order of the Commission, or charging, collecting, or receiving a higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, neither the carrier, nor its officer, agent, or employe, indicted for the offense of extortion, is by the terms of said Act, or by any other statute of Kentucky, allowed or permitted to interpose or establish by evidence at the trial the defense that the existing rate charged, collected, or received by such carrier is just and reasonable, or that the rate made and fixed by the Commission in lieu thereof is unjust and unreasonable. (Par. VI, Tr. 9-10.)

Appellant further alleges said Act is not only violative of the said sections of the State Constitution, and is, therefore, void, but that it constitutes an abandonment by the State of Kentucky of a republican form of government in so far as it undertakes to vest legislative, executive, and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV of the Constitution of the United States, and, therefore, void. (Tr. 10.)

Appellant in its bill also makes the following averments (Tr. 10-11):

> The said Act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitu-

tion of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said Act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an Act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said Act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Constitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdiction, either State of Federal.

It is further averred that the McChord Act is unconstitutional by reason of its penalty provisions (Par. VIII, Tr. 11).

By way of showing how the provisions of this Act, and the Commission's orders in pursuance thereof, operate to deprive a railroad carrier of its property without due pro-

cess of law, and to deny such carrier the equal protection of the laws, appellant further alleges (Par. IX, Tr. 12):

> Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said Act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said Act, required to make and fix what it may think is a just and reasonable rate, toll or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered, and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission, it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said Act, and thus such railroad carrier is deprived of its property without due process

of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Again, in line with the allegations last quoted, the bill contains averments concerning its property right to initiate its own rates in the State of Kentucky, and to charge and receive for the services it performs just and reasonable compensation (Par. XIII, Tr. 21-22).

Furthermore, it is alleged in the bill that the orders of the Commission herein complained of operate as a regulation, direct interference with, and burden upon, commerce among the States as follows (Par. XII, Tr. 20-21):

> Complainant states that the reduction in its said rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce complainant's existing rates on said commodities shipped to and from stations on its lines in Kentucky to and from stations on its lines outside of Kentucky, as the full amount of complainant's said existing local rates in Kentucky enter into and form a part of its through rates set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910, and remaining on file with that Commission ever since, as required by law, on such interstate shipments of freight belonging to the same classes. The said order made by the Commission, were it to become effective, would not only reduce complainant's said local rates in Kentucky and cause an annual loss to complainant on intrastate freight of at least $15,600, but would directly and necessarily result in reducing complainant's through rates on interstate shipments of such freight, and cause an annual loss to complainant thereon of not less than $3,000. Thus the total reduction in the revenues of complainant directly resulting from the order aforesaid, should the same be put into effect, would be not less than $18,600 per annum. Complainant states that the change in rates and charges directed by the Commission in its order aforesaid would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on complainant's lines, and

to put into effect said orders would be, to that extent, a direct regulation of interstate commerce and in violation of Clause three (3), Section eight (8), Article one (1), of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the Act to amend the Act to Regulate Commerce, approved June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, wherein the power to fix and regulate rates to be charged, collected or received by railroad carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Acts of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power or authority to regulate or fix rates to be charged, collected or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers on interstate freight or traffic, or to impose any orders, rules, charges or regulations, the necessary result of the enforcement of which would be to affect and regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the Act aforesaid. Complainant states that the order of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which complainant relies on and invokes in the premises.

These averments with respect to appellant's interstate rates are elaborated and made more specific in the second amended bill, hereinafter referred to, filed January 12, 1911. (Tr. 113-120.)

The rates fixed by the Commission are one-way flat rates on the commodities mentioned, without reference to the uses or purposes to which they are to be applied by the consignees, whereas the complaint of said distillery corporations before the Commission only challenged the

reasonableness of the existing rates on said commodities *to be used for manufacturing and shipping whiskey.* That alone was the subject-matter of the complaint, the object and prayer of which was to have restored the low special rates on said commodities to be so used in force prior to March 25, 1910. That the orders of the Commission condemning appellant's existing rates as extortionate, and fixing flat rates on said commodities *to be used for any and all purposes, and awarding reparation,* were and are arbitrary, because made without any evidence, and void, as alleged in the bill as follows (Par. XI, Tr. 19):

> There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky or between the points of origin and of destination aforementioned were, in and of themselves, unjust, unreasonable or extortionate; nor was there any evidence introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from this complainant on account of previous payment by them or any of them of alleged unjust or unreasonable or extortionate rates.

Again, to the same effect, are the following allegations (Par. XI, Tr. 19-20):

> Complainant further shows that said written orders of the Commission, dated August 10, 1910, which purport to make and fix rates that may be charged, collected and received by complainant for the transportation of the commodities therein named between the points of origin and destination—all within the State of Kentucky—that are in said written order set forth, are null and void, for the additional reason that said orders do, by their terms, purport to make and to fix rates that may be charged, collected, and received by complainant for the transportation of the commodities named between the

points mentioned, without reference to the uses or purposes to which such commodities were to be applied by the consignees at the points of destination, and that such written orders do, by their terms, make and fix flat rates applicable to the commodities named wholly without regard to the uses or purposes to which such commodities were to be applied by the consignees thereof, whereas, in fact and in law, the only subject-matter that was brought before the Commission for investigation by the Greenbrier Distillery Company and others in the proceeding aforementioned, was the making and fixing of rates for the transportation of the commodities named in said petition to be used by the consignees, being plaintiffs in said proceeding, in their several distilleries at or near the respective points of destination in the production of whiskey and for no other use or purpose whatsoever. This complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting, as aforesaid, the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

Among other grounds alleged for invoking the interposition of a court of equity is that which seeks to avoid a multiplicity of prosecutions by indictment, that may, and will be found and prosecuted against appellant, its officers, agents, and employes, to recover the excessive fines and penalties imposed by the McChord Act, for charging,

collecting, or receiving a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, and also the numerous suits in the circuit courts of the various counties upon the several awards wrongfully and illegally made by the Commission. (Pars. XIV, XV and XVI, Tr. 22-24.)

It is also alleged that appellant had no adequate remedy at law. (Tr. 24.)

Upon the filing of the bill, His Honor, Judge Cochran, granted a restraining order as prayed for, a certified copy of which was duly executed upon each of the appellees, and the same was by its terms to remain in full force and effect until a hearing was had upon the application for an interlocutory injunction and the further order of the court in the premises. (Tr. 40-42.)

The application for such injunction was in said restraining order set for hearing on September 26, 1910, that being the first day of the next regular term of the court below at Frankfort, Kentucky.

Upon the calling of the cause in court at the time and place stated, the appellant, in support of its said application, beside its bill as amended verified by A. R. Smith, its third vice president, filed the affidavits of C. B. Compton, its traffic manager, and D. M. Goodwyn, its general freight agent, and appellees in opposition to said application, filed their demurrer to the whole bill, and their demurrer to part of the bill, and the affidavits of the appellees, Adam T. Siler and Lawrence B. Finn, and also the affidavits of W. A. Miller and R. H. Edelen, the former vice president of Wright & Taylor, and the latter president of the Mattingly & Moore Distillery Company, two of the distillery corporations which joined in the complaint in the proceeding before said Commission, which resulted in the making and promulgation of the orders herein complained of.

Thereupon, Judge Cochran announced in open court that on account of his prior connection with two other cases involving the question of the constitutionality of the McChord Act, he would decline to sit in this case, and would certify his unwillingness to do so to the presiding circuit judge of the Sixth Circuit. (Tr. 44.)

Afterward, His Honor, Circuit Judge Warrington, was duly assigned to sit in this case, and it being suggested to him by counsel for appellees that Section 17 of the Commerce Court Act, approved June 18, 1910, applied to this case, he, in pursuance of the provisions of that section, called to his assistance to hear and determine appellant's application for an interlocutory injunction District Judges Sanford and Denison of the Sixth Circuit.

Section 17 of the Commerce Court Act, approved June 18, 1910, effective sixty days after its passage, is as follows:

> That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall

be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

The appellant's said application and appellee's demurrers were subsequently set for oral argument on November 3, 1910, at Covington, Kentucky, before the three judges named. Upon the calling of the cause at that hearing, the appellant tendered, and, without objection by appellees, was permitted to file its amended bill of complaint, to which appellees filed their demurrer to the whole bill as amended.

Counsel for the parties having orally argued the questions involved, the case was submitted on appellant's application for an interlocutory injunction and on appellees' demurrers to the original bill, and the bill as amended, disth leave to print a transcript of the record and furnish the members of the court copies thereof, together with in the' briefs of counsel for each party by November 25, complainTr. 74-75.)

The amended bill filed on November 3, 1910, sets out the different lines of appellant, owned and operated in Kentucky, on August 10, 1910, and since that date, located in fifty-seven (57) counties, and aggregating 1,527.97 miles of main track; and the average total mileage of the lines owned and operated by it in that State and other States during the fiscal year ended June 30, 1910, and on August 10, 1910, being 4,590.55. (Par. XVIII, Tr. 75-78.)

In its said amended bill appellant also set up and relied on the existing contract between the State and itself contained in the provisions of its charter granting it the right to charge certain maximum freight and passenger rates, which freight rates are in excess of the rates condemned by the Commission as extortionate; and alleges that while said contract is subject to revocation or repeal, it has never been revoked or repealed by the Legislature. (Par. XIX, Tr. 79-80.)

The nature and effect of the Commission's order complained of herein and some of the facts sustaining appellant's contention that the rates prescribed by that order are arbitrary, unjust, unreasonable, discriminatory, and illegal are specifically stated in the concluding paragraph of its amended bill. (Par. XX, Tr. 80-82.)

Among other grounds stated in that amended bill, in connection with the allegations of the original bill, raising Federal questions, are these (Par. XX, Tr. 81-82):

> 4. The enforcement of the rates prescribed in said order will bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points in other States and transported between the same points in Kentucky, thus placing a burden on interstate commerce, or else to apply the said rates, without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.
>
> 8. The enforcement of said order will compel complainant to accept upon interstate as well as in-

trastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which will not yield to complainant a fair or reasonable compensation for the services performed, and will deprive complainant, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The enforcement of the rates fixed by said order would compel complainant to charge and receive a less rate or compensation for the transportation of property of like kind, both intrastate and interstate traffic, for a longer haul than for a shorter haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States, unless relieved therefrom by the further order of the Railroad Commission of said State and the order of the Interstate Commerce Commission.

After the submission of the case on November 3, 1910, the court below on January 9, 1911, delivered its written opinion, wherein appellant's motion for an interlocutory injunction was denied, but the restraining order of September 7, 1910, was continued in force until an opportunity had been given for appellant to secure a review subject to conditions, which were to be prescribed in an order thereafter to be entered. (See Opinion, Tr. 85-112; 186 Fed. 176-204.) In order, as the court stated in its said opinion, that the right of appeal directly to this court from its decision on the motion for an interlocutory injunction might not be embarrassed, the court below refrained at that time from passing on the demurrers. (Tr. 111-112.)

In the course of its opinion the court, with respect to so much of appellant's bill as alleged the rates fixed by the

Commission in the order complained of, if enforced, would directly and necessarily interfere with and operate to reduce appellant's interstate rates on the same commodities, and amount to a regulation and a burden upon interstate commerce, stated (Tr. 105-6; 186 Fed. 197-8):

> One averment in form is that the McChord Act "is an express and direct interference with and regulation of interstate commerce" (Par. IX of Bill). We have no hesitancy in saying that the Act is not open to any such interpretation; nor in affirming that nothing is to be found in the rate order in dispute or in any fact either averred or shown, tending to disclose a design on the part of the Commission to interfere with or to regulate interstate commerce. When we consider the bill and affidavits in connection with assertions made in the brief of complainant, we infer that it is intended to set up general classes of facts and specific facts as follows: A certain volume of interstate traffic, in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north of the Ohio River through Covington or Newport to some of the interior points named in the order. Some of this originates at Cincinnati, some further north. The existing through rate from Cincinnati is and has been the same as from Covington or Newport, and the through rate from points north of and beyond Cincinnati is and has been the same as the rate from those points to the Ohio River, plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be $38.40, and the new rate from Covington would be $24.00. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) $5.00. Under the new rates this carload could be shipped from Cincinnati to Bardstown for not to exceed $29.00. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease unless complainant should, as it would for business reasons, reduce the through rates to (for example) $29.00. A substantially similar state of facts exists at the Louisville gateway with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in

the brief.) It is averred that the enforcement of the new rates will cause an annual loss of $15,600 to complainant in its rates on local shipments, and a further annual loss of $3,000 in its rates on interstate shipments; and it is stated by affidavit that there are no through rates on the articles in question from points outside the State to points within the State, such charges being assessed by combining the rates from points of origin to Louisville, to Covington or to Newport (at which points such shipments enter the State) with the rates from those points to the point of destination in Kentucky.

Since it is to the interest of both parties to this case that the actual facts should be made to appear by proper pleadings, we have concluded to say that the complainant may, if it sees fit, amend its bill so far as it truthfully can aver the facts just recited and which we infer from the sources of information before pointed out to exist.

In pursuance of the leave thus granted, appellant tendered its second amended bill January 12, 1911, elaborating and making the averments of the original bill with respect to the interference and burden on interstate commerce more definite, specific and certain, which the court below, in a written supplemental opinion, permitted to be filed. (Tr. 112-121.)

On the same day, after considering the additional averments contained in said second amended bill, the court entered its order denying appellant's motion for an interlocutory injunction, but continuing the restraining order in force on certain terms and conditions as follows (Tr. 122-3):

This cause having come on to be heard upon the motion of complainant for an interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911, and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered,

It is ordered, that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted,

It is further ordered, that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the Commission's order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further order of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of $10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order—unless defendants should make it appear to this court that condition 1, 2 or 4 has not been performed within such thirty days."

Thereafter, on February 6, 1911, in pursuance of said order, appellant filed its written statement showing the amounts paid by various consignees and shippers named

therein on distillers' supplies, etc., on shipments moving from August 10 to December 31, 1910, inclusive, between the points above mentioned, in excess of the amounts they would have paid had such shipments been charged for on the basis of rates as fixed by said Commission's order, aggregating for said period $6,248.49, which sum was paid into court. (Tr. 123-25.)

Appellant also then executed the special bond in the sum of $10,000, in pursuance of the terms imposed by the order appealed from, by the covenants of which appellant and its surety are obligated to file statements thereafter on the 15th of each month, commencing with February 15, 1911, covering the preceding calendar month, showing all freight charges received by appellant in excess of the rates fixed by said Commission's order of August 10, 1910, and to pay into court the amount of such excess charges; such statements to also show the names and addresses of all parties paying such excess; and to continue to file such monthly statements and make such payments into court until the further order of the court below or of this Court. (Tr. 125-6.)

Appellant likewise at the same time filed its petition for appeal to this court, assignment of errors, and executed its appeal bond, which the court approved, allowed the appeal prayed for, and thereupon citation was waived in open court by counsel of record for appellees. (Tr. 127-137.)

The errors assigned are as follows (T. 128-134):

ASSIGNMENT OF ERRORS.

And now on this, the 6th day of February, 1911, comes the complainant and appellant, Louisville & Nashville Railroad Company, by William G. Dearing, Albert S. Brandeis, and Henry L. Stone, its counsel, and says that in the order rendered by the court in the above entitled cause on January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against said defendants and appellees, in accordance with the prayer of its original bill and the terms and provisions of the restraining order granted September 7, 1910, upon the filing of its said bill herein, and in the record and proceedings in said cause in this court, there is manifest error as set forth in this, its assignment of errors, which is presented and filed simultaneously with its petition for appeal, and this court erred in denying its said application and motion, as follows:

I.

In not granting its said application and motion for an interlocutory injunction, because the McChord Act of the Legislature of Kentucky, approved March 10, 1900, entitled "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions," and the order of August 10, 1910, made by appellees in pursuance of said Act, herein complained of, are violative of the provision of Section One (1) of Article XIV of the Amendments to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and because the enforcement of said order of August 10, 1910, unless enjoined herein, will operate to deprive complainant

and appellant of its property without due process of law.

II.

In not granting its said application and motion for an interlocutory injunction, because said McChord Act and said order of August 10, 1910, herein complained of, are violative of the provision of Section One (1) of said Article of the Amendments to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction, the equal protection of the laws, and because the enforcement of said order of the appellees will operate to deny to the appellant the equal protection of the laws.

III.

In denying the said application and motion for an interlocutory injunction on the ground that the appellant cannot invoke the guaranty of the due process clause of the Federal Constitution, or claim that it is violated by the rate order of August 10, 1910, herein complained of, unless it avers and proves that the reduced rates fixed thereby are confiscatory—that is to say, would not yield to it, for the service performed, any profit, or that its entire business would not do so, although it is averred in the bill as amended, and proven by the affidavits filed in support thereof, that the reduced rates prescribed by said order are arbitrary, unjust, unreasonable, discriminatory, and will not yield to it a fair or reasonable compensation for the service performed, and will deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to such service or the public use, with respect to the intrastate traffic involved or carried under the rates thus prescribed.

IV.

In denying said application and motion for an interlocutory injunction on the ground that appellant was not entitled to any judicial review of said rate-making order of the Railroad Commission to avoid violation of the guaranty of due process pro-

vided in the Federal Constitution; that the notice and hearing before said Commission, as provided in the "McChord Act," was all it was lawfully entitled to; and that the order of August 10, 1910, herein complained of, reducing its rates, after such notice and hearing, became (at the expiration of ten days from the mailing of a copy of such order to a representative of the appellant) final, conclusive and of full force and effect.

V.

In not holding the excessive and burdensome penalty provisions of the "McChord Act" are unconstitutional on their face, under the due process and equal protection clauses of the Federal Constitution, and Section 17 of the Constitution of Kentucky, and the order of August 10, 1910, made by the Railroad Commission under said Act, void and unenforcible, and in not granting, on that ground, the application and motion of appellant for an interlocutory injunction against the appellees, enjoining them from enforcing their said order by indictments and prosecutions to recover the penalties provided by said Act, without regard to the insufficiency of the rates prescribed by said order, and notwithstanding the affidavits of two out of three of the members of said Commission disavowing their present purpose to try to enforce said order by criminal proceedings or through the penalties provided in said Act, at least until the validity of said order has been passed upon in a civil suit, when it is their sworn official and statutory duty to institute and prosecute such criminal proceedings against appellant, its officers, agents and employes, for any and all violations of said order.

VI.

In holding that appellant is not entitled to complain of the McChord Act on account of the provisions thereof with respect to fines and penalties, where it cannot aver and maintain that the rates prescribed by the Commission's said order are confiscatory.

VII.

In not holding the order complained of is invalid and void because the said Commission is without power or authority (as by said order it undertook to do) to prescribe for observance by appellant rates which are less than the maximum rates it is authorized and empowered to charge and collect by its legislative charter, which charter provision has not been repealed, and constitutes a contract between it and the State of Kentucky; and in not holding, on that account, the said order operates to deprive appellant of its property in violation of the due process clause of the Federal Constitution; and also operates to impair the obligation of such contract in violation of the contract clause of Section Ten (10), Article One (1) of the Federal Constitution.

VIII.

In not holding the said "McChord Act" unconstitutional and said rate order of August 10, 1910, void, because said Act undertakes to confer upon the Railroad Commission, and administrative or ministerial body, judicial power and the authority of a court, as well as legislative powers, over and concerning the rates of railroad carriers, and to deprive such carriers of their rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed by said Commission, in violation of the provisions of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the making and promulgation of its said order herein complained of; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said Act and order on that ground.

IX.

In not granting appellant's application and motion for an interlocutory injunction against appellees,

as constituting the Railroad Commission of Kentucky, enjoining them from proceeding to enforce their said rate-making order of August 10, 1910, because said order is arbitrary and void, having been made when no testimony or evidence had been adduced at the hearing or investigation in the proceeding before said Commission, in which said order was entered and promulgated, which established or tended to establish that any of the rates of appellant, which were effective March 25, 1910, and that have been since that date charged, collected and received by it for transportation services on the commodities and between the points named in said order, were or are unjust, unreasonable or extortionate; and because there was no evidence whatsoever introduced in said hearing or investigation or considered by said Commission, which showed or tended to show in the slightest degree what was or might be a just and reasonable rate to be thereafter charged, collected or received by appellant for the transportation of the commodities from the points of origin to the points of destination named in said order, and the subject-matter of the justness or reasonableness of rates for such transportation of said commodities between said points for all purposes and without regard to the use to which they were to be applied, was *coram non judice* said Commission at said hearing and investigation, all of which is specifically alleged in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

X.

In not granting appellant's application and motion for an interlocutory injunction enjoining the enforcement by appellees, as constituting said Commission, of their order awarding so-called reparation in sundry sums to the parties, respectively, named in said order dated August 10, 1910, and enjoining the appellee, Adam T. Siler, as chairman of said Commission, from filing a certified copy of said order for such reparation in the office of the clerk of the circuit court of any county into or through which run the line or lines of road owned or operated by appellant carrying the freight, as to which the said award of reparation in said order was made, or any other

county within the State of Kentucky, on the ground that said order is arbitrary and void, no evidence having been heard or introduced in said investigation, when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from appellant on account of previous payment by them, or any of them, of alleged unjust, or unreasonable or extortionate rates, all of which is averred in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

XI.

In not granting appellant's application and motion for an interlocutory injunction, as stated in paragraph No. X of this assignment of errors, and as prayed for in its bill, because there is no valid statute of the State of Kentucky granting power or authority to said Commission to make, promulgate or enforce the said order awarding reparation of the parties instituting the proceeding before it in which said order was entered, Section 829, Kentucky Statutes (the only statutory provision bearing on the subject of reparation) not being applicable to said proceeding under the said "McChord Act," and, if it were, it is unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein, with respect to the trial in the circuit court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

XII.

In not holding that the "McChord Act" constitutes an abandonment by the State of Kentucky of a

republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over and concerning the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and, therefore, void.

XIII.

In not holding that the rate-making order of August 10, 1910, herein complained of, violated the provision of Section 817, Kentucky Statutes, against unjust discrimination, and that complainant cannot obey said order with respect to the 16 distillery stations, constituting the destinations of the commodities named in said order, out of the 48 distillery stations in all on its lines in Kentucky, without violating the provisions of that section and creating an unjust discrimination, as alleged in its second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XIV.

In not holding that the said order of the Railroad Commission violated the provisions of Section 818, Kentucky Statutes, against making or giving an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, and against subjecting any person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, the facts showing such undue or unreasonable preference or advantage, and such undue or unreasonable prejudice or disadvantage, being alleged in appellant's second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XV.

In not holding that the said rate-making order of the Railroad Commission in its operation and enforcement directly, immediately and necessarily interferes with, affects and compels reductions in complainant's existing legal, just and reasonable rates in force March 25, 1910, and ever since, covered by its tariffs published and on file with the Interstate Commerce Commission, on the same commodities, shipped in the same quantities, to the same points of destination on appellant's lines in Kentucky, as stated and set out in said order, from Cincinnati, Ohio, and other points of origin outside of Kentucky, thus resulting in an annual loss, as alleged in the original bill, to appellant on interstate shipments to the 16 distillery stations named in said order of, at least $3,000, and on intrastate shipments to the same stations of $15,600; and upon the application of the reduced rates prescribed by said order to the shipments of such commodities to the other 32 distillery stations on appellant's lines in Kentucky, resulting in an additional annual loss of, at least, $54,000, one-half of which would be on interstate shipments and the other half on intrastate shipments thereto, as alleged in appellant's second amended bill, and not controverted by answer or otherwise; and in not holding that said order is illegal and void, because in its operation and enforcement it would substantially, directly and necessarily burden and regulate interstate commerce, hamper and prevent the enforcement of the Act to regulate commerce, and compel appellant to abandon or surrender the rights which it has under the Constitution of laws of the United States, and place appellant in such a position it cannot enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey the provisions of said order, all in violation of the commerce clause of the Federal Constitution, the facts showing which are specifically averred in appellant's bill as amended, and not denied or controverted by answer or otherwise, but admitted by appellees' general demurrer; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said order on that ground.

XVI.

In not holding that said order of August 10, 1910, herein complained of, in its direct and necessary operation and effect upon the rates of appellant as a common carrier by railroad of interstate commerce violates Section 2 of the Act to regulate commerce which prohibits unjust discriminations, and in not, on that ground, granting appellant's application and motion for an interlocutory injunction enjoining its enforcement.

XVII.

In not holding that said rate-making order of the Railroad Commission in its direct and necessary operation and effect upon the rates of appellant as an interstate common carrier by railroad, violates Section 3 of the Act to regulate commerce, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Wherefore, the appellant, Louisville & Nashville Railroad Company, prays that the order of the Circuit Court of the United States for the Eastern District of Kentucky, entered January 12, 1911, denying appellant's application and motion for an interlocutory injunction herein, be reversed, and that said Circuit Court be directed to grant said application and motion for an interlocutory injunction in accordance with the prayer of the original bill as amended, and substantially in the terms of the restraining order of September 7, 1910, issued upon the filing of the original bill.

BRIEF OF ARGUMENT.

I.

JURISDICTION OF THE COURT BELOW.

The constitutionality of the McChord Act has been involved in two prior suits, which came to this court for final adjudication. (*McChord* v. *Louisville & Nashville Railroad Company,* 183 U. S. 483; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175.)

In the first case the constitutionality of said Act though raised, was not passed on by this court, the decree of the court below, the Circuit Court of the United States for the District of Kentucky, (*Louisville & Nashville Railroad Co.* v. *McChord,* 103 Fed. 216), being reversed with a direction that it be dismissed, on the ground that the suit for an injunction had been prematurely brought, no order prescribing railroad rates having been made by the Commission.

In the second case this court again refrained from passing upon the constitutionality of the said Act, although the question was raised, and affirmed the decree of the court below (Judge Cochran, following the decision of Judge Evans in 103 Fed. 216, having held said act unconstitutional and void), upon the ground that the order complained of, which prescribed schedules of maximum rates on all commodities for observance by the appellee (the appellant herein) between all points on all its lines in Kentucky, was beyond the power of the Commission conferred by said Act, properly construed, even if it were valid. In adopting this method of disposing of that case this court said (Ib. 193):

> Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the State statute and the authority therein given to the Commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

In the opinion by Mr. Justice Peckham in the case last referred to, after reciting the several Federal questions raised by the bill (which were substantially the same as the Federal questions made by the bill as amended in the present case), this court upheld the jurisdiction of the court below as follows:

> The Federal questions, as to the invalidity of the State statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only.
>
> This court has the same right and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. (*Horner* v. *United States* (No. 2), 143 U. S. 570, 576; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 154; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *Burton* v. *United States*, 196 U. S. 283, 295; *Williamson* v. *United States*, 207 U. S. 425; *People's Savings Bank* v. *Layman*, 134 Fed. Rep. 635; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223.) Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. (*Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223 *supra*.)

> The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court.

On the question of jurisdiction the court below in the present case said (186 Fed. 179-80):

> In view of the character of some of the Federal questions presented by the averments of the bill as amended and of the good faith in which the questions are urged, it is scarcely necessary to say that jurisdiction of the cause is vested in this court through the presence of those questions, no matter how it shall be found necessary to decide them, or whether to decide them at all. *Siler* v. *Louisville & N. R. R. Co.*, 213 U. S. 175, 190, 29 Sup. Ct. 451, 53 L. Ed. 753. The nature of the Federal questions made is for the most part like those relied on in that case, and they will be stated as we progress.

It thus appears that the question made in the demurrers of the appellees as to the jurisdiction of the court below herein is effectually foreclosed in appellant's favor.

II.

THE DEMURRERS TO THE BILL.

The demurrer to the whole bill as amended presents five grounds, to-wit: (1) that complainant is, by its own showing, not entitled to the relief prayed; (2) the bill is without equity; (3) the complainant has an adequate remedy at law; (4) the bill is multifarious; and (5) the court has no jurisdiction to hear and determine the matters set up in the bill. (Tr. 71-73; 83.)

The fifth ground, raising the question of jurisdiction, has already been discussed. Of course, on a general demurrer all the *facts* well pleaded in the bill, as amended, are admitted to be true.

As to the first ground, the facts set out in the bill being admitted, if the McChord Act and the Commission's orders thereunder violate either or any of the provisions of the Federal or State Constitutions, as alleged, the relief prayed is entirely appropriate and appellant is clearly entitled thereto.

That relief is, in substance, that on final hearing the said Act be declared and adjudged by decree of this court to be in violation of the Constitution of the United States, and the Constitution of the State of Kentucky, and, therefore, void, and that appellees, individually and jointly as constituting the Railroad Commission of Kentucky, be perpetually enjoined from recommending or causing to be instituted any prosecution by indictment or otherwise against appellant, or any of its officers, agents, or employes, to recover any fine or penalty imposed by said Act for or on account of appellant's failure or refusal to put into force or effect, on any of

its lines of railroad in said State, said Commission's orders, promulgated August 31, 1910, herein complained of, or the rates prescribed thereby.

That the bill is *not* without equity is abundantly shown by the allegations thereof, among others, contained in Paragraphs XIV, XV and XVI, wherein a multiplicity of prosecutions and legal proceedings is shown to be imminent, and appellant, to avoid them, has no adequate remedy at law. The second ground of demurrer is, therefore, not maintainable.

The third ground "that complainant has an adequate remedy at law" will be discussed further on, when we come to the question of what constitutes in a case of this character "*due* process of law."

The fourth ground, which asserts the bill is multifarious, is likewise without foundation. The two orders of the Commission herein complained of were made at the same time, in the same proceeding, between the same parties, and are based upon the same controversy. One order covering the entire ruling of the Commission could have been made, and splitting the finding or conclusion into two orders was unnecessary. If the McChord Act, under which the Commission claimed power and authority to make these orders, is unconstitutional and void, this suit to enjoin the enforcement of the orders as made sets up but one cause of action.

In *Street's Federal Equity Practice*, Vol. 1, Sec. 404, the author states:

> The objection of multifariousness is not looked upon with much favor, and it is one that addresses itself to the discretion of the court. A suit will not be thrown out for this fault except in a clear case. Though a bill is multifarious, in the sense of embracing more than one subject, it will yet be sustained if such procedure is necessary or highly conducive to the administration of justice. The rule against

multifariousness looks to the prevention of needless expense, complexity of the proceedings, and unnecessary prolixity of the pleadings, all of which manifestly tend to delay and annoyance. As has been truly said, the objection of multifariousness is often taken but seldom sustained. When certain very rudimentary conceptions of propriety are fulfilled, the sphere in which a bill becomes objectionable for multifariousness is a rather circumscribed one. It is only when the defect becomes so pronounced as to constitute an obstacle to the proper administration of justice that the courts are inclined to entertain it.

Again, in Section 405, it is stated:

> A bill is not necessarily rendered multifarious by reason of the fact that there may be united in it several causes of action. If all the different causes of action united in the bill grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be maintained.
>
> No bill is multifarious that presents a common point of litigation, the decision of which will affect the whole subject matter, and will settle the rights of all the parties to the suit; and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others.

In *Brown* v. *Guaranty Trust & Safety Deposit Co.*, 128 U. S. 412, this court said:

> It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with others. (Citing authorities.)
>
> To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill (Citing authorities.)

The demurrer to that part of the bill which seeks to enjoin and declare void the order awarding reparation to the distillery corporations, which instituted the proceeding before the Commission, will be considered later on, when we come to deal with the provisions of Section 829, Kentucky Statutes, relied on by appellees to sustain that order. It is sufficient to state here that said section has no application to the proceeding before the Commission on the complaint of said distillery corporations, *under the McChord Act*, and, if it were applicable thereto, it is invalid because of certain restrictions and limitations contained therein which will be hereinafter discussed.

While the court below refrained from passing on the demurrers to the original and first amended bills we insist they presented no obstacle to the granting of appellant's motion for an interlocutory injunction.

III

THE McCHORD ACT VIOLATES SECTIONS 27, 28, 109 AND 135 OF THE STATE CONSTITUTION BY UNDERTAKING TO CONFER UPON THE RAILROAD COMMISSION JUDICIAL POWERS.

Error assigned as VIII will be discussed under this heading.

Section 1 of the McChord Act expressly provides that:

"It shall be the duty of the Commission *to hear and determine* the matter (of alleged extortionate rates) as speedily as possible;" that the Commission "shall *hear* such statements, arguments or *evidence*, offered by the parties, *as the Commission may deem relevant;* and should the Commission *determine* that the company or corporation is, or has been, *guilty of extortion*, said Commission shall make and fix a just and reasonable rate," etc. Furthermore, said Act provides that the order entered on the record book of said Commission, fixing a rate, "*shall be in full force and effect* at the expiration of ten days thereafter," etc.

In the language of Judge Evans in *Louisville & Nashville Railroad Co.* v. *McChord, et al.*, 103 Fed. 222:

> These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearance of inflicting that much punishment upon the party found "guilty of extortion" by this non-judicial body.

Again Judge Evans states (Ib. 223-4).

> The investigation of a complaint and the decision thereon by the Commission that the railroad complained of is 'guilty of extortion," being the only

> way to put the Act in motion, the railroad is entitled to first have a *judicial* determination of the question of its guilt, *before* the rate can be lowered as a penalty for the act charged to have been committed. The Commission can not *judicially*, nor by due process of law, determine the one question upon which its right to fix a lower rate must depend. * * * Nothing short of a *judicial* proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted. The legislature may delegate to a Commission power to establish rates generally, but not the power to try an individual railroad for an *offense*, and lower its rates, alone, as the penalty of such *conviction*.

Further on he states (Ib. 226):

> The court is of the opinion that the Act violates the Constitution of the State, in attempting to confer upon the Commission what are *judicial* powers and functions, to-wit: the power, after complaint and notice given, to "hear and determine" that the railroad has been "guilty of extortion," and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a *judicial* proceeding and judgment.

It will be observed that this Act does not provide, as is usual in such Acts defining the powers of Railroad Commissions, that the rates prescribed by the Commission in lieu of those found to be extortionate, shall be regarded *prima facie* as just and reasonable, or that the order of the Commission shall be presumed to be *prima facie* correct. Such a provision in said Act would have plainly indicated that it was the intention of the Legis-

lature that the rates prescribed were not to be regarded as final and conclusive, and were subject to *judicial review*, but instead of such usual provision, this Act declares that after ten days the order condemning the existing rate as extortionate and prescribing a new rate for like services thereafter rendered, "*shall be in full force and effect.*"

This language in said Act is the equivalent of a declaration that the order of the Commission adjudging the carrier's existing rate to be extortionate, and fixing another in its place, *shall be final and conclusive*. Such a provision in the Constitution of California was held to be unconstitutional and void by then Circuit Judge, now Mr. Justice McKenna of this court, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236.

So, an Act of the Kansas Legislature, conferring upon a body called the Court of Visitation power to prescribe maximum rates, and to determine whether or not those rates were reasonable, was held to be in violation of the Constitution of Kansas to the extent that it conferred *judicial* powers upon the same body upon which it conferred legislative and executive powers. (*Western Union Telegraph Co.* v. *Myatt*, 98 Fed. 335.)

A like provision in the Texas Statute, making the establishing of rates by the Railroad Commission *conclusive* evidence of the reasonableness of those rates, was virtually held to be invalid in *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.

In *Smyth* v. *Ames*, 169 U. S. 466, one of the many points decided was that, while rates for the transportation of persons and property within the limits of the State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitu-

tion secures, and, therefore, without due process of law, can not be so *conclusively determined* by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of *judicial review*.

The contrary was held in *State* v. *Chicago, etc., Railway Co.*, 38 Minn. 281, upon granting an application by the Railroad and Warehouse Commission for a writ of mandamus to compel the C. M. & St. P. R'y Co. to comply with the recommendation made to it by the Commission to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, but that ruling was reversed and the statute of Minnesota, so construed, was held to be unconstitutional and void by this Court in *Chicago, M. & St. P. R'y Co.* v. *Minnesota*, 134 U. S. 418.

In *Roberts* v. *Hackney*, 109 Ky. 265, the court said (Ib. 268):

> But by Section 109 of the Constitution now in force, the *judicial* power of the Commonwealth is vested in the *courts* established thereby. These are the court of appeals, circuit courts, quarterly courts, county courts, justices' courts, police courts and fiscal courts. * * * Under this imperative provision of the Constitution, *no judicial power* can be exercised by any other officer except those named, unless authorized by some other provision of that instrument.

In that case the chairman of the board of trustees of a town of the sixth class, who assumed to discharge judicial powers under certain sections of the Criminal Code, was held to have done so without legal authority.

In *Pratt* v. *Breckinridge*, 114 Ky. 1, it was held, under Sections 27, 28, 109 and 135 of the Constitution, the Legislature has no power to create a board to try election contests, as such a board would exercise judicial powers, and be, therefore, a court.

Section 28 of the State Constitution provides that:

> No person or collection of persons, being of one of those departments (legislative, executive or judicial) shall exercise any power properly belonging to either of the others, except in the instances hereinafter *expressly directed or permitted.*

This language in Section 28 unquestionably prohibits the Railroad Commission, an executive or administrative body provided for in Section 209 of the State Constitution quoted in appellant's original bill, from exercising any judicial power, because the latter section does not *expressly* direct or permit such power to be exercised by that body, although it provides:

> The powers and duties of the Railroad Commissioners shall be regulated by law.

In regulating the Commission's powers and duties by *law*, the Legislature must necessarily conform its legislation for that purpose to the prohibitions in Section 28, as well as in Sections 27, 109, and 135, of the State Constitution.

So, it becomes a question of construction of the McChord Act, and for appellant it is insisted that the construction placed thereon by Judge Evans in the case above referred to is correct; and as stated by Chief Justice Fuller in *McChord* v. *Louisville & Nashville Railroad Co.*, 183 U. S. 495:

> The objection that before this is done (entering orders fixing rates) the Commission is required to exercise *judicial* functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the *validity* of the Act.

It will be observed that the McChord Act consists of only two branches. The first declares the contingency in which the Commission may act *judicially* and take from the railroad company, and thereafter assume for itself,

the rate-making power. The second provides a single method of enforcing the rates made by the Commission in its *legislative* capacity in those cases where it has taken the rate-making power from the railroad company, which method of enforcement is *by indictment of a grand jury in a criminal prosecution* to inflict the heavy fines and penalties prescribed by the Act, both upon the company and upon its officers, agents, or employes, varying from $500 to $5,000 for each offense.

No better definition can be found of what constitutes a judicial act, and of what constitutes a legislative act, with respect to the rates of a public service corporation, than that laid down by Mr. Justice Brewer in *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific R'y Co.*, 167 U. S. 499, as follows:

> It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a *judicial* act; but an entirely different thing to prescribe rates which shall be charged in the future —that is a *legislative* act.

We now call this Court's attention to the views of the court below in passing on the question whether the McChord Act confers *judicial* power on the Commission in violation of the State Constitution. (Tr. 90-96; 186 Fed. 183-189). That court appears to have reached the conclusion that said Act does not attempt to vest such power in the Commission, but that its power over and concerning railroad rates is only legislative in character. In the course of its discussion of this objection to said Act, the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132-140, is referred to. In that case the Court of Appeals held that Sections 816 and 819, Kentucky Statutes, which penalized a railroad company for exacting "more than a just and reasonable rate of toll and compensation for the transportation of passengers

and freight," were *unconstitutional* so far as their provisions were penal, because of their indefiniteness and uncertainty, saying:

> No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury.

It was said by the court below that said decision led to the enactment of the McChord Act, vesting in the Commission the power to ascertain when a railroad carrier is "guilty of extortion," and, if such carrier is found guilty, with the further power to fix a rate in lieu of the one found to be extortionate. Both of these powers, it is said, are legislative.

In this connection the court below cites the case of *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, and states that it should be noted that Mr. Justice Peckham did not in that case observe any vice in the use of the word "extortion." In the passage quoted from that opinion this Court was dealing with the construction of the Act and the scope of the powers granted thereby, after passing the question of its constitutionality, and reached the conclusion the Commission had no power thereunder to prescribe for the observance of a carrier a schedule of maximum freight rates on all classes and commodities, between all points on all its lines in the State, as the Commission had attempted to do in that case.

Again, the case of *Prentis* v. *Atlantic Coast Line Railroad Co.*, 211 U. S. 210, 226, is cited by the lower court as holding the inquiry and decision of the State Corporation Commission of Virginia, concerning the reasonableness or

unreasonableness of existing rates, preceding the fixing by it of a schedule of maximum rates for a railroad carrier, are merely preliminary to its legislative act in prescribing new rates. But that Commission, unlike the Kentucky Commission, was by the Constitution of Virginia expressly vested with legislative, judicial, and executive powers, and with the general and plenary power to prescribe schedules of maximum rates for all railroad carriers in that State, but even then was not expressly required to find such a carrier guilty of extortion, as a condition precedent to the exercise of its right to supplant an existing rate by a new one. The rates sought to be enjoined in the Virginia case were alleged to be confiscatory, and the Commission pleaded the proceedings before it were those in a court of the State, which the Federal Courts, by Section 720, U. S. Revised Statutes, had no power to enjoin. If the Kentucky Commission could be vested with judicial powers under the Constitution of that State, the *Prentis case* would be applicable; but, so long as the rule laid down by Mr. Justice Brewer for this Court in *Interstate Commerce Commission* v. *C. N. O. & T. P. R'y Co., supra*, stands as correct, we shall insist judicial power has been unlawfully conferred on the Kentucky Commission by the McChord Act, for in that case it is distinctly stated "to inquire whether rates which have been charged and collected are reasonable (or extortionate, as provided in said Act) is a *judicial* act."

But the court below also refers to the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 106 Ky. 633, decided prior to the passage of the McChord Act, as showing the power there exercised by the Commission and upheld as lawful by the Court of Appeals was of a judicial nature. There the *specific power* was granted to the Commission by Section 218 of the State Constitution, in special cases, to relieve railroad carriers from the operation of the long and short haul provision contained in that section,

which forbids (as did Section 4 of the Act to regulate commerce at that time) a railroad company to charge a greater compensation for transporting passengers or property, *under substantially similar circumstances and conditions,* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; provided, however, that, in special cases, upon application to the Railroad Commission, the carrier might, after investigation by said Commission, be authorized to charge less for a longer than a shorter distance, and that the Commission might, from time to time, prescribe the extent to which such carrier may be relieved from the operation of said section. It appeared in that case the Louisville & Nashville, in the transportation of coal, charged less for a longer than for a shorter distance, justifying such charge on the ground that it was necessitated by competition at the longer distance point, and insisted, therefore, the charge at the shorter distance point was not "under substantially similar circumstances and conditions." But after investigation, the Commission declined to relieve the Company from the operation of said section or the statute made in pursuance thereof, and the Company, thereafter insisting upon what it conceived to be its lawful right, was subsequently indicted and fined, at the instance of the Commission.

The Court of Appeals affirmed the judgment of the Circuit Court, using the language quoted in the opinion of the court below in the present case (186 Fed. 188), and that decision was affirmed by this Court. (183 U. S. 503, 515). We fail, however, to see the application of that case to the one under consideration. The question of the reasonableness of existing rates for the shorter haul or of those for the longer haul was not involved, and at that time no attempt had been made by the Legislature to give the Commission the rate-making power. The question was simply

one of *fact* whether the circumstance of competition at the longer distance point entitled the carrier to charge *less* on coal to that point than to an intermediate point.

The Commission held competition was not sufficient to make substantially a dissimilar condition, and the courts upheld its authority to decide the question, on the ground that the Constitution by Section 218 had created it "a special tribunal for this purpose."

It matters not whether the authority thus conferred be legislative, judicial, or executive, it was granted to the Commission by said Section 218 of the Constitution itself specifically, which is after Section 28 thereof, hereinabove quoted, which declares:

> No person, or collection of persons, being of one of those departments (legislative, executive or judicial) shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*

It is insisted, however, that Section 218 of the Kentucky Constitution does not delegate *judicial* powers to the Commission. That section positively prohibits a railroad company from charging or receiving a greater compensation for the transportation of passengers or of property of like kind, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, with a proviso, empowering the Commission to ascertain the existence of a *particular fact*, that is to say, where any railroad company departs from this rule on the ground that the circumstances and conditions are substantially dissimilar, the Commission, on application, after investigation, ascertains the *fact*, and refuses or grants relief accordingly, and its action in the case cited was construed to be final. This power is neither legislative nor judicial, but purely executive or administra-

tive. This Court has so announced repeatedly in similar cases.

In *Field* v. *Clark*, 143 U. S. 649, the constitutionality of the McKinley Tariff Act of 1890 was attacked on the ground that Congress had attempted to delegate legislative power to the President, by providing in effect that, when he ascertained any other country which produced and exported to the United States certain commodities was imposing unequal or unreasonable duties or other exactions upon the products of the United States, it should be his duty to suspend, by proclamation, the provision of said Tariff Act relating to the future introduction of such articles from such country. In disposing of that contention this Court said (Ib. 693):

> As the suspension was absolutely required when the president ascertained the existence of a *particular fact*, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to *ascertain and declare the event* upon which its expressed will was to take effect.

The same doctrine was announced by this Court in *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, where in the latter case this Court said (Ib. 386):

> By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule pre-

> scribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not* be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions.

The court below also cites on this branch of the case *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91, where the suit was brought by the Commonwealth to compel the company to furnish a passenger train on its branch line between Shelbyville and Christiansburg, Kentucky. Section 772a, Kentucky Statutes, requires railroad companies to run at least one passenger train on its lines each way on every day, except Sunday. The Commission had ordered such passenger service to be put in, but the company refused to do so on the ground that compliance therewith would entail upon it a heavy and continuous loss. The court, however, enforced the recommendation of the Commission, holding the Statutes requiring such service to be reasonable.

The decision there has no bearing on the case at bar. The question there presented and decided was really whether the company owed a duty to the public to perform a function contemplated and imposed by its charter and also specified in the general laws of the State, viz: To run a passenger train daily each way over a branch line d[illegible]ich the company had constructed for the use of a lessee app[illegible]pany for a limited through service.

refus[illegible]d section of the Statutes prescribes the quality case ci[illegible]e required of a railroad company, and declares legislativ[illegible]lation of the provisions thereof shall subject the

company to a forfeiture of its charter and to a fine upon conviction thereof.

As the present case involves the validity of orders relating to rate-making, it differs essentially from the case above named. This essential difference was pointed out by this Court in *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, 206 U. S. 1, wherein an order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld despite the fact that it was conceded that the return from the operation of such a train would not be remunerative. On page 26, this Court said:

> This is (the distinction), because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of *unreasonableness*, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth* v. *Ames*.

And the above language was quoted with approval in the later case of *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262-278. The syllabus in the latter case, which involved an order of the State Commission requiring a train to be run from a point within the State to the State line, contains the following statement:

> There is a difference between the exertion of the legislative power to establish rates in such manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard and one compelling the corporation to render a service which is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due

process of law, or a taking of private property for public use without compensation; nor is such an order an *unreasonable* exercise of governmental control.

Accordingly, the fact that the Kentucky Court of Appeals decided that the railroad company could be compelled, in a suit brought by the State, to render a service which was essentially its duty to perform, under its charter or the general laws of the State, cannot be used to sustain the contention of the appellees that the Commonwealth has a right to institute an action for a mandamus or a mandatory injunction to force a carrier to obey an order of the Commission, fixing *rates* for the transportation of freight. There is no provision in any of the statutes of Kentucky, authorizing the enforcement of an order of the Commission concerning rates, by mandamus, or by mandatory injunction, or by other process in the courts, in the name of the State or of the Commission, nor has the Court of Appeals in any decision ever held that an order of the Commission reducing or prescribing rates for a railroad carrier may be thus enforced.

In *Pennington* v. *Woolfolk*, 79 Ky. 13, to which the court below refers (Tr. 96) by way of showing the Court of Appeals has held a power *not judicial* might be lawfully conferred upon a county court, the controversy related to the revenue of the State. The Act in question empowered that Court "to assess and fix the value" on property omitted from assessment by the assessor. The decision was under the Constitution of 1850, which was like previous Constitutions and the present Constitution, concerning the distribution of powers. The court stated that statutes conferring similar powers on the county court had been acquiesced in as valid for more than three-quarters of a century by the bar and all departments of the government, thus receiving a practical construction which would not be overturned. But the court in that

case appears to have overlooked Section 33, Article IV in the Constitution of 1850, which provided:

> The jurisdiction of the county court shall be regulated by law, and, until changed, *shall be the same now vested in the county courts of this State.*

That section seems to have been controlling of the question involved in that case, because powers and jurisdiction relating to the revenue of the State and tax matters had been conferred on the county court ever since the Constitution of 1792. This section came within the exception to Section 2, Article 1, of that Constitution, forbidding the exercise by any person, being of one department, of any power properly belonging to either of the others, as follows: "except in the instances hereinafter expressly directed or permitted."

Section 1, Article IV, of the Constitution of 1850, concerning the judicial department, contained a provision allowing the General Assembly, from time to time, to erect and establish courts *other* than those therein named, inferior to the Court of Appeals, while Section 135 of the present Constitution for the first time effectually prevents the establishment of any more courts than those named in Section 109 thereof, in which the whole judicial power of the Commonwealth is vested, by declaring:

> No courts, save those provided for in this Constitution, shall be established.

Since the adoption of the present Constitution, this prohibition has been strictly adhered to and enforced by the Kentucky Court of Appeals, as will be seen from the authorities already cited. (*Roberts* v. *Hackney*, 109 Ky. 265; *Pratt* v. *Breckenridge*, 114 Ky. 1.)

IV.

THE McCHORD ACT AS ADMINISTERED BY THE COMMISSION OPERATES TO DEPRIVE THE CARRIER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND TO DENY TO THE CARRIER THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF SECTION 1 OF THE FOURTEENTH AMENDMENT.

The application of errors assigned as I, II, and IV, will be discussed under this heading.

Neither the said Act nor any other statute of the State of Kentucky provides for an appeal to any court from a final order of the Commission adjudging the carrier's existing rate extortionate and taking away from it the rate-making power over the subject-matter of the complaint, nor for any judicial investigation or review of the question of the reasonableness of the rate fixed by the Commission. The carrier is compelled, therefore, either to put in such rate, although insufficient to afford a fair and just return upon the value of its investment devoted to intrastate traffic, and to suffer the consequent loss (notwithstanding it may be unjustly discriminatory), or to disobey the Commission's order and risk numerous prosecutions and the infliction of enormous fines and penalties.

If the carrier's property is not to be taken without due process of law or for public use without just compensation, and yet its use is to be regulated and the prices obtained for the services its owner renders are to be controlled by order of the Commission or statute, there must be full opportunity for judicial examination of every such statute or order for the purpose of determining whether

it goes further than the limits fixed by the fundamental law which controls even the statute-making and order-making bodies. Thus it was said by this court in *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota*, 134 U. S. 458:

> The question of the *reasonableness* of a rate or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for *judicial* investigation, requiring due process of law for its determination. If the company is deprived of the power of charging *reasonable rates* for the use of its property, and such deprivation takes place in the absence of an investigation by *judicial* machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States.

In Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 399, Mr. Justice Brewer said:

> In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. This, as has often been observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held.

In *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 224-5, Judge Evans stated:

Of the hearing upon the charge before the non-judicial administrative body, a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over that thus fixed, of having it convicted of another and further extortion, without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief in the absence of an express statutory requirement. These considerations, therefore, seem to bring this case within the principle first above quoted from the opinion of the Supreme Court in the Minnesota case. If it had been the intention of the Legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the Act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms, in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a Commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the Commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose thus plainly written in the legislation must be fatal to its validity.

There has been no change in the status of State legislation with respect to the powers and duties of the Com-

mission since this decision of Judge Evans. It remains just as it was then, and the sound reasoning he employed in that decision, after full argument by able counsel representing the parties at that time, has in the meantime lost none of its logic or convincing power. It is a precedent in a case involving the validity of the McChord Act set in the Circuit Court of the United States for the District of Kentucky, prior to the division of that State into the Western and Eastern Districts, which, it seems to us, should have been followed by the court below. There has been no decision either of the Court of Appeals of Kentucky or of this court since Judge Evans delivered his said opinion, which authorizes the conclusion, as asserted by the learned counsel for appellees in their oral argument of this case in the court below, that he would not now adhere thereto, if the objections to said Act were again presented to him.

In *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 172, this court said:

> Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State Legislature for the carriage of passengers and freight are *unreasonable*. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men, and by this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it *by*

the arbitrary enactment of any Legislature, State or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. (Citing authorities.)

It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the Legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the Legislature proceeds further, and declares that *only a certain price* shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken *without due compensation;* and the *legislative* determination of value does not preclude an investigation in the *proper judicial* tribunals. *The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.*

If the question of the reasonableness of the rates of a railroad company can not be so conclusively determined by the Legislature, or by a Commission under its authority as to preclude judicial inquiry, and if a railroad has the right of appeal to the courts for the final determination of that question, and the right to invoke such judicial inquiry and protection is guaranteed by the Federal Constitution, then clearly, if an act be so framed as to destroy or evade such judicial supervision, it must be held

void if the guarantees of that Constitution are to be enforced. The McChord Act is of that description. From its language, if the railroad carrier does not put into force the reduced rate as ordered by the Commission, indictments upon the recommendation of that body may be found against it in numerous counties of the State, as well as against any officer, agent, or employe who fails to do so, or charges, collects, or receives a higher rate.

The only pleas allowable under the Criminal Code of Kentucky to an indictment are as follows (Sec. 172):

1. A plea of guilty.
2. Not guilty.
3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty.

A defense or proof to the effect that the existing rate of the carrier is reasonable, or that the rate fixed, in lieu of it, by the Commission is unjust or unreasonable, would not be permitted by the criminal court under the plea of "not guilty" to an indictment against the carrier or any of its officers, agents, or employes. Besides, if such a defense, or proof to sustain it, were allowed to be presented for the consideration of the jury in a criminal court, under the McChord Act, the question of reasonableness of the rate charged, collected or received by the carrier or officer, agent or employe indicted, after a verdict and judgment of *acquittal*, could not be pleaded as as *res judicata* on the trial of another indictment in the same or another criminal court against the same carrier, officer, agent, or employe for charging, collecting, or receiving a higher rate than that fixed by the Commission on another shipment in the same schedule of maximum rates. Nor could a verdict and judgment of *conviction* in one criminal case be pleaded as *res judicata* by the Com-

monwealth on the question of the reasonableness of the rates fixed by the Commission.

Such a remedy, even if allowed by the Act in question, does not afford the "*due* process of law" to which the carrier is entitled before its property or the use thereof can be taken by the State or the Commission acting for and in its behalf. A criminal court has no equity jurisdiction. It can not grant a preliminary or permanent injunction against the enforcement of unjust or unreasonable rates. Its powers and jurisdiction extend only over the carrier or person indicted. It has no power to appoint a special Master or Commissioner to take evidence and to report thereon. The trials in such a court are before a jury. The machinery of a court of criminal jurisdiction is wholly unadapted to the trial and determination in any authoritative or conclusive manner, of the question of the reasonableness or unreasonableness of a schedule of maximum freight rates prescribed for observance by a railroad carrier.

It is clear, and it must be conceded by appellee's learned counsel, that upon the trial of an indictment the determination of the reasonableness of the Commission's rate, if that question can be then inquired into, is wholly for the jury. Section 353 of the Criminal Code of Practice of Kentucky, dealing with the subject of appeals in misdemeanor cases, is as follows:

> The judgment shall be reversed for any error of *law* appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

It is settled by the decisions of the Court of Appeals of Kentucky that if there be *any* evidence to sustain a judgment of *conviction*, such judgment will not be reversed on the ground that it is *against the evidence*. (*Pat-*

terson v. *Commonwealth*, 86 Ky. 313; *Franklin* v. *Commonwealth*, 92 Ky. 612.)

The hopelessness of submitting a question of this character to a jury and of permitting it to go at large into an investigation of the history and financial condition of a railroad company, the nature and extent of its revenues and expenses, and the propriety of all the elements of each, is such that the question has never to our knowledge been actually submitted to a jury, even in a civil case, although it is a common law principle that there may be recovered from a carrier any excess charged by him over a just and reasonable rate.

In *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460, Mr. Justice Miller, concurring, said:

> The proper, if not the *only*, mode of judicial relief against the tariff of rates established by the Legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of a just compensation for the service rendered.

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 394, Mr. Justice Brewer distinctly recognizes that the court applied to must have and should exercise the power to issue a preliminary injunction, in a proper case, for the carrier's protection during the pendency of the suit to settle and determine the reasonableness of a body of rates prescribed for a railroad company, as follows:

> The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess

> of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property, that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the Commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the Commission.

This argument, in behalf of the Texas Commission, however, was rejected by this court in that case as unsound.

In *Smyth* v. *Ames*, 169 U. S. 518, Mr. Justice Harlan said:

> The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. *Only* a court of equity is competent to meet such an emergency and determine, *once for all* and without a multiplicity of suits, matters that affect not simply individuals, but the interest of the entire community.

This Court in *Detroit* v. *Detroit Citizens Street R. Co.* 184 U. S. 381, repeated with approval the language of Mr. Justice Harlan last quoted, and said:

> *Only* a court of equity is competent to meet such an emergency.

Nothing can be more erroneous than to say that regardless of the appropriateness of the tribunal, all that *due process* demands is "reasonable notice and a fair opportunity to be heard."

A very different definition of due process is that given by Judge Cooley:

> Due process of law *in each particular case* means such an exertion of the powers of government as the

> settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the *class of cases to which the one being dealt with belongs.* (*Cooley's Const. Lim.* (7th Edition), 506.)

The same author states that what may be sufficient due process in one case may not be sufficient in another. (Ib. 502.)

Mr. Justice Field in *Hagar* v. *Reclamation District*, 111 U. S. 708, in defining due process of law, states:

> It is sufficient to observe here that by "due process" is meant one which, following the forms of law, *is appropriate to the case and just to the parties to be affected.* It must be pursued in the ordinary mode prescribed by the law; *it must be adapted to the end to be attained;* and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.

Mr. Justice Bradley, in a concurring opinion in the case of *Davidson* v. *New Orleans*, 96 U. S. 107, said:

> I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is *some* process of law, but "*due* process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the *cause* and *object* of the taking, whether under the taking power of eminent domain, or the power of assessment for local improvements, or none of these; *and if found to be suitable or admissible in the special case*, it will be adjudged to be "due process of law"; but if found to be *arbitrary, oppressive and unjust*, it may be declared to be not "due process of law."

The very familiar definition of "due process of law," which Mr. Webster formulated and which has been approvingly recognized by this Court (*Hurcy* v. *Elliott*, 167 U. S. 418), declares in part:

> The meaning is that every citizen shall hold his life, liberty, property and immunities *under the protection of the general rules which govern society.*

In *Violett* v. *Alexandria,* 92 Va. 561, 569, the Virginia Court of Appeals quoted with approval the following language from the opinion of the Court of Appeals of New York:

> It may, however, be stated generally that due process of law requires an orderly proceeding *adapted to the nature of the case,* in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. We can not conceive of due process of law without this.

And again in the same opinion, on page 572, an essential element of due process is declared to be a hearing "before some authority *competent* to afford relief in case of invalidity or injustice." and on page 573 it is recognized that the proceedings must be "appropriate to the nature of the case."'

In the Minnesota case, cited above, the rates fixed by the Railroad Commission were made enforceable by mandamus proceedings (a civil suit) in the Supreme Court of that State. The railroad carrier offered in defense of that kind of a proceeding to show by evidence the rates prescribed for its observance were *unreasonable,* but the court refused to allow such evidence to be introduced, on the ground that under the statute of that State the action of the Commission was final and conclusive on the question of the *reasonableness* of the rates prescribed. On the question of whether such a statute, thus construed, afforded due process of law, this court said (134 U. S. 456):

> This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It de-

prives the company of its right to a *judicial* investigation by due process of law under the forms and *with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy*, and substitutes therefor, *as an absolute finality*, the action of a railroad commission which, in view of the powers conceded to it by the State court, *can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice*.

In the case of *Ex parte Young*, 209 U. S. 123, the court reiterated the principle that the only way by which the large property interests of railroad companies and other public service corporations can be protected from such legislative wreckings is by a bill in equity. In that case Mr. Justice Peckham said (Ib. 163-5):

> It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, *at least once*, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.
>
> Another obstacle to making the test on the part of the company might be to find an agent or employe who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the Passenger Rate Act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five

years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before *a jury*, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago, etc., Railway Co.* v. *Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a *jury*. Suits for penalties, or indictment or other criminal proceedings for a violation of the act would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were *too low* and therefore the act invalid.

Again in the same case it was said (Ib. 165):

> To await proceedings against the company in a State Court grounded upon a disobedience of the act, *and then if necessary obtain a review in this court*

*by writ of error to the highest State Court, would place the company in peril of large loss * * * if it should be finally determined that the act was valid.* This risk the company ought not be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people, who are scattered over the whole country from ocean to ocean, and they are entitled to *equal protection* from the laws and from the courts with the owners of all other kinds of property, no more, no less. *The courts having jurisdiction, Federal or State, should at all times be open to them as well as to others for the purpose of protecting their property and their legal rights.*

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, *and enjoining the enforcement of the act until the decision of the court upon the legal question.*

The court further stated (*Ib.* 166):

The question of *sufficiency of rates* is important and controlling, and being of a *judicial* nature it ought to be settled at the earliest moment by some court, and when a Federal Court first obtains jurisdiction it ought on general principles of jurisprudence to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts.

But it is argued by appellees' learned counsel that the McChord Act does not *expressly forbid* the railroad carrier from going into a court of equity, either State or Federal, and obtaining relief by injunction, against the enforcement of arbitrary, unjust, unreasonable, or confiscatory rates prior to the expiration of the interim of ten days before such rates become effective. With respect to appellant's right to seek such relief in a Federal court of equity, it is not at all dependent upon State legislation, nor can that right be in any way abridged or denied by such legislation. It is a right guaranteed by the provisions of the Constitution of the United States. (Sec. 2, Art. III.)

We contend, however, that the Act in question is void, *because it does not provide for any appeal by the carrier to a State court or a judicial review of any kind of the reasonableness of railroad rates fixed by the Commission before they become effective.* It is no answer to this objection to the constitutionality of the Act to say that the appellant has its remedy and actually resorted to it by bringing this suit in this court. The very fact that the Act is unconstitutional on account of its failure to provide for an appeal or a judicial review furnishes one of the main grounds for the relief sought herein. Appellees' reasoning on this subject is fallacious. They argue, in effect, that any Act of a State Legislature which denies or fails to provide for a judicial hearing in behalf of the carrier before its property rights are taken from it is constitutional, because such carrier has its remedy by suit in a Federal court of equity to enjoin its enforcement on the ground that such Act violates the provisions of the Constitution of the United States. In other words, such an Act is *valid*, because the carrier may protect itself from its enforcement by bill in equity for an injunction in a Circuit Court of the United States on the ground that it is *invalid*.

The contention of appellees that the McChord Act is valid, notwithstanding it is silent with respect to a judicial review, is unsound. It is insisted for appellant that the right of the carrier to a judicial hearing before being compelled to put into effect the rates prescribed by the Commission must be expressly provided in the Act or in some other statute of the State, else it is invalid. This essential to validity can not be left to the discretion of a court, which may not grant appropriate or any relief. When the Hepburn Act, approved June 29, 1906, was before Congress, the necessity of incorporating a provision therein granting the carrier a judicial hearing upon any

rate fixed for it by the Commission, and allowing the same to be suspended before the carrier was required to put the same into effect, was discussed by the ablest lawyers in the Senate, and the conclusion was finally reached by a majority of that body that the Act would be unconstitutional without such a provision. So Section 16 of the Act to regulate commerce was amended so as to contain the following provision:

> The venue of suits brought in any of the circuit courts of the United States against the Commission *to enjoin, set aside, annul or suspend any order or requirement of the Commission* shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, *and may be brought at any time after such order is promulgated.* And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; *and jurisdiction to hear and determine such suits is hereby vested in such courts.*

Following out this necessary provision for a judicial review of Commission-made rates for interstate carriers, it is expressly provided in Section 1 of the Mann-Elkins Bill, approved June 18, 1910, as follows:

> That a court of the United States is hereby created, which shall be known as the Commerce Court, and shall have the jurisdiction *now* possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: • • •
>
> Second. *Cases brought to enjoin, set aside, annul or suspend, in whole or part, any order of the Interstate Commerce Commission.*

In the recent decision in the case of *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, decided January 25, 1909, in speaking of Section 213 of

the Constitution of Kentucky, which requires, according to the construction given thereto by the Court of Appeals of that State, one carrier to deliver its own cars loaded with freight to another carrier at a point where there is a physical connection between their tracks, Mr. Justice Holmes for this court said:

> It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal undiscriminating requirement, with no *adequate provisions* such as we have described. The want cannot be cured by inserting them in judgments under it. *The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.* See *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409; *Connecticut River R. R. Co.* v. *County Commissioners*, 127 Mass. 50, 53; *Ash* v. *Cummings*, 50 N. H. 591; *Moody* v. *Jacksonville, Tampa & Key West R. R. Co.*, 20 Fla. 597; *Ex parte Martin*, 13 Ark. 198; *St. Louis* v. *Hill*, 116 Mo. 527. It follows that the requirement of the State Constitution *cannot stand alone under the Fourteenth Amendment*, and that the judgment in this respect also, being based upon it, *must fall.*

In *Roller* v. *Holly*, 176 U. S. 409 (one of the cases cited in the opinion of Mr. Justice Holmes last quoted from) this court said:

> The right of a citizen to due process of law must rest upon a basis more substantial than *favor* or *discretion*.

The court below held the McChord Act is not unconstitutional under the due process clause of the Fourteenth Amendment, because it provides for notice to the carrier and a hearing and trial on evidence before the Commission, a non-judicial body, although it makes the latter's order prescribing rates final and conclusive on the carrier, without right of appeal to a court or to a judicial review. (Tr. 98-101; 186 Fed. 191-93.)

To sustain its ruling in this respect two cases are cited, the first being *C. N. O. & T. P. Ry. Co.* v. *Commonwealth*, 81 Ky. 492, affirmed by this court in *Kentucky Railroad Tax Cases*, 115 U. S. 321; and the other being *San Diego Land Co.* v. *National City*, 174 U. S. 739. The first case is a tax case involving the revenue of the State. It is a well established doctrine in this country that in cases of that class due process of law does not necessarily mean judicial process, notice and an opportunity to be heard on the subject of the value of the property assessed before the assessing officer or board provided by law being sufficient.

So, in *Murray's Lessee, et al.* v. *Hoboken Land & Improvement Co.*, 18 How. 272, this court said (Ib. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a *distinction* between such claims and all others, which has sometimes been carried out by summary methods of fines and penalties, but always in some way observed and yielded to.

Again, this court in *Bauman* v. *Ross*, 167 U. S. 548, recognizing the same doctrine, said (Ib. 590):

> If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

(See also *Paulson* v. *Portland*, 149 U. S. 30; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Hibben* v. *Smith*, 191 U. S. 310.)

In the *Kentucky Railroad Tax Cases*, however, it clearly appears, and Mr. Justice Mathews refers to the fact (at page 335), the tax imposed had to be ultimately enforced by judicial proceedings, whereby the railroad companies were afforded all they claimed they were entitled to in the way of a judicial hearing.

The second case cited by the court below to sustain its view that the McChord Act making the order of the Commission fixing rates final and conclusive, without affording the carrier a judicial review, simply because it provides for notice and hearing, is *San Diego Land and Town Co.* v. *National City*, 174 U. S. 739. That suit was brought by the appellant, a Kansas corporation, in the Circuit Court of the United States for the Southern District of California, against the appellee, a municipal corporation of California, to enjoin the enforcement of an ordinance adopted by the appellee fixing the rates for water supplied by appellant to appellee and its inhabitants, for one year.

The Constitution of California provided that the rates to be collected by any corporation in that State for water supplied to any city or town or its inhabitants shall be fixed annually by the board of supervisors, council, or other governing body of such city or town, by ordinance or otherwise, to be passed in February of each year and take effect on July 1 thereafter, and further provided

that such right to furnish water was a franchise which could not be exercised except by authority of and in the manner prescribed by law, and that any corporation collecting water rates in any city or county otherwise than as so established should forfeit its franchise and waterworks to such city or town. The injunction was sought on the ground that appellant had no notice or hearing upon the matter of fixing its water rates; that they were fixed arbitrarily, and were unreasonable, unjust, and confiscatory. The court, however, said that the Constitution itself was notice that such an ordinance would be passed annually in February and would take effect on July 1 thereafter; and it was the right and duty of appellant in January of each year to furnish the appellee with a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by an ordinance. Thus provision was made for a hearing in an appropriate way, it being the duty of appellee to receive, consider, and give proper weight to such statement in determining rates. The court further said the power thus conferred on appellee could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who supplied it with water, "for the State cannot by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property *just compensation for its use.*" (Ib. 754.)

The court then proceeds to say:

> In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that

> a State enactment invades or destroys rights secured by the Constitution of the United States a *judicial* question arises, and the courts, Federal and State, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

In that case the whole body of the company's rates for supplying water to the city and its inhabitants was involved, and the question, as the court states, was whether, under the evidence, such rates as fixed by the city amounted

> to a taking of property without *just compensation*, and, therefore, to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. (Ib. 760.)

This court simply held the evidence of appellant in that case was insufficient to sustain the averments of its bill, and was very far from holding the action of the city's board of trustees, in fixing water rates, was final and conclusive, and not subject to judicial review.

V.

APPELLANT IS ENTITLED TO JUST AND REASONABLE COMPENSATION FOR EACH SEPARATE SERVICE, AND IF COMPELLED TO ACCEPT LESS COMPENSATION, WITHOUT A JUDICIAL HEARING, IT IS DEPRIVED OF ITS PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Under this heading we shall discuss the error assigned as III.

So long as a common carrier's existing rates are just and reasonable for the services it performs, it is within its constitutional and statutory rights. If it goes beyond that limitation, and charges, collects, or receives more than a just and reasonable rate or compensation for its transportation services, it is in the wrong. What constitutes a just and reasonable rate for the services a carrier has performed is a question of fact on which the carrier is entitled to a *judicial* hearing. Still more is it entitled to such a hearing, if, as a consequence of a decision by the Commission that it has exceeded the limits of just and reasonable compensation for past services, it must forfeit in favor of such statutory body its *rate-making power* and be deprived of that property right with respect to "like services thereafter rendered," as provided in the McChord Act. To prescribe rates which shall be charged in the future is the exercise of a legislative function. Before the Commission, under the McChord Act, can take a step in the direction of fixing rates for a railroad carrier's future services, it must, after notice and investigation, determine, from the evidence, such carrier's existing rates are extortionate, or, in other words, find

"the company or corporation is or has been guilty of extortion." That determination or finding is the essential *jurisdictional fact*, which must exist before the Commission can take away such carrier's right to initiate and make its own rates, and acquire for itself the power to make rates for "like services thereafter rendered." If the existing rates of the carrier accused of extortion are not in fact unjust, unreasonable or extortionate, then the Commission has no power, authority or jurisdiction, under the terms of the Act, to prescribe reduced rates, in lieu of them, for that particular carrier's services in the future. It is upon the existence or non-existence of that jurisdictional fact that the Commission's power or lack of power, in any given case, depends. Only a court of equity can fairly, finally, and conclusively determine whether or not such jurisdictional fact actually existed when the Commission assumed and exercised the rate-making power. If upon a judicial investigation and the evidence adduced by the parties it turns out such jurisdictional fact did not exist, then all that the Commission did, on its erroneous assumption or finding, in the way of making rates for the carrier's services thereafter performed, is necessarily null and void, without regard to whether the new rates prescribed, under such circumstances and conditions, are reasonable or unreasonable, compensatory or confiscatory. The sole question under the provisions of the Act we are dealing with, in this respect, is one of power. So, we claim that appellant is entitled to a judicial hearing upon the questions of fact, when the case comes to be tried on its merits (a stage which it must be remembered by this court it has not yet reached), viz:

1. Were appellant's existing rates unjust, unreasonable, or extortionate, as found by the Commission?

2. Are the reduced rates prescribed by the Commission arbitrary, unjust, unreasonable, discriminatory, or otherwise illegal, as alleged in the bill?

Sufficient evidence appeared, it seems to us, from the uncontradicted averments of the verified bill as amended and the affidavits filed in support thereof, to have required the court, on the hearing on the motion for an interlocutory injunction, to answer the first of the foregoing questions in the negative and the second in the affirmative.

There was no answer filed in the court below, the demurrers to the bill and first amended bill were not passed on by that court. All the facts well pleaded in the original and two amended bills which were verified (Tr. 26, 82, 120-121), being uncontradicted, should on the motion for a temporary injunction have been treated as true. They were fully supported by the affidavits of Traffic Manager Compton (Tr. 45-48) and General Freight Agent Goodwyn (Tr. 59-65).

Some of the most important *facts*, thus alleged in the bill as amended and proven by these witnesses, to establish the proposition that these two vital questions should be answered as above indicated are called to the court's attention briefly, as follows:

1. The existing rates found to be extortionate by the Commission, August 10, 1910, on the complaint of twenty-three interested distillery corporations, having plants for the manufacture of whiskey at the sixteen stations on appellant's lines in Kentucky, are the usual and standard rates of appellant on corn, rye, barley and malt, and the other commodities named in the Commission's order, which have been in force for a great many years, charged and received at all stations on all its lines in Kentucky, for like distances, for uses and purposes *other* than the manufacture and shipment of whiskey, without any complaint whatever from any of such consignees.

2. The special and unusually low rates on such grain and commodities, when used in the manufacture and shipment of whiskey at the plants of the Greenbrier Distillery Company and others, were voluntarily put in originally by appellant to encourage whiskey manufacture at interior points in Kentucky, when that industry was in its infancy, but when said special rates had become no longer necessary, and the conditions which first prompted appellant to put them in had ceased to exist, and the distillers who had been benefited by them had prospered, and within the past few years many of them had made enormous fortunes, the usual and standard rates charged and received from *all other consignees* of like commodities were restored and applied also to distillers' supplies, on March 25, 1910.

3. The said special rates on distillers' supplies were applied to forty-eight stations in all on appellant's lines where distillery plants are located, a list of which will be found in Mr. Compton's affidavit (Tr. 77-78), the distillers at thirty-two or two-thirds of which had made no complaint to the Commission since appellant withdrew such low rates and put into effect its usual and standard rates on shipments of such supplies to all of said forty-eight stations.

4. To put into force again said special rates to only sixteen or one-third of said stations, as ordered by the Commission, would create an unjust discrimination against the distillers at the other thirty-two stations.

5. The Commission's rates apply only from three points of origin (Louisville, Covington, and Newport) to sixteen points of destination named in the order of August 10, 1910, and *apply only one way*, while shipments of the same kind of commodities *from the sixteen points to the three points mentioned must take appellant's usual or standard rates thereon*, thus establishing an un-

just discrimination against shippers and localities, and an undue and unreasonable preference in favor of others.

6. The complaint of the distillery corporations before the Commission asked only for a restoration of the special rates on such grain and commodities used in the manufacture and shipment of whiskey as existed prior to March 25, 1910, yet the order of the Commission not only grants such special rates, where the shipments are used for the manufacture and shipment of whiskey, but grants *flat rates*, on such commodities without regard to the use to which they are to be put.

Mr. Compton states that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified, a large proportion of which will be devoted to uses *other* than the manufacture and shipment of whiskey, thus making an unjust discrimination against shippers of the same commodities to and from other points in the State, and in favor of the sixteen points named in the Commission's order. (Tr. 52-53.)

7. The establishment of such special rates on said commodities will create, as will be hereinafter commented on, an unjust discrimination against a necessary interference with, and a burden upon, interstate commerce passing through the Cincinnati and Louisville crossings of the Ohio River.

8. The Commission's rates create an undue and unreasonable discrimination in both the intrastate and interstate rates on said commodities against intermediate stations on appellant's lines between the points of origin and destination in Kentucky, set out in the Commission's order, which is illustrated by the table in Mr. Compton's affidavit with respect to the six stations at which distillery plants are located on the Lebanon Branch. (Tr. 56-7.)

9. The rates complained of create a distinction between corn, rye, barley and malt, on the one hand, and wheat, oats and other kinds of grain, on the other hand, prescribing lower rates on the former, and leaving appellant's existing or standard rates in force on the latter from the same points of origin, over the same line, to the same points of destination, shipped in the same quantities, when appellant's usual or standard rates apply to *all* kinds of grain alike.

10. The Commission's rates apply only to *carload lots* of corn, rye, barley and malt, whereas appellant's usual or standard rates apply alike to *less than carload and carload* shipments of *all* kinds of grain, thus creating an unjust discrimination against the shippers of grain in *less than carload* lots, which does not now exist.

11. The rates complained of are substantially *lower* in comparison with the rates charged elsewhere in Southeastern territory by appellant and by other railroad companies, and are materially *lower* than the rates fixed and declared by the same Commission in 1906 (afterward set aside by the decree of the court below, which this court in the case of *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, affirmed because the Commission had no power to prescribe the same), to be just and reasonable for the transportation of such commodities in Kentucky for the same or similar distances upon appellant's lines, as well as upon those of the Illinois Central, the Southern Railway, the N., C. & St. L. Railway, and the C., N. O. & T. P. R'y Co. in said State. (Tr. 57; second table with Goodwyn's affidavit, Tr. 62-63.)

12. The special rates prescribed in the Commission's order are *lower* than are charged and received by the appellant on the same commodities for the same distances on any of its *other* lines (over 1,500 miles in length) in any other section of the State of Kentucky.

Thus an unjust discrimination is established against other localities and shippers, and an undue preference given to the sixteen stations and the distillers located thereat, named in said order, in violation of the Kentucky Statutes (Section 817) and the Act to regulate commerce (Sections 2 and 3).

13. The rates complained of have been prescribed in absolute disregard of the laws of the State (Kentucky Statutes, Sec. 820), forbidding a railroad carrier to charge or receive any greater compensation in the aggregate for the transportation of property of like kind under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance. This is clearly illustrated by Mr. Compton's table of the rates and distances on the Lebanon Branch. (Tr. 54-5-6.) The circumstances and conditions are the same. (Tr. 56-7.) The like provision in Section 4 of the Act to regulate commerce is also disregarded by the Commission's rates where appellant carries interstate shipments of said commodities through the Cincinnati and Louisville crossings of the Ohio River to the points named in the order of August 10, 1910, on its existing interstate rates made up as they are by a combination of the rates north and south of the Ohio River.

14. The Commission's rates are unjust and unreasonable because the only way in which appellant can avoid the unjust discrimination and undue preferences above stated will be to put in said special rates adopted by the Commission, on said commodities and all other grain, in *any* quantities, upon *all* its lines, between *all* stations *both* ways, for the *same* or *similar* distances in Kentucky, on *both* intrastate and interstate shipments, thus entailing a loss in revenues of $54,000 annually, the amount stated in the amended bill, without any compensating re-

sults, and without any other parties having complained of such existing rates, beside the twenty-three distillery corporations at said sixteen stations. (First Amended Bill, Clause 10, Tr. 82; Compton's Affidavit, Clause 10, Tr. 58; Goodwyn's Affidavit, Clause 10, Tr. 64-5. Second Amended Bill, Tr. 119.)

15. The rates prescribed by the Commission are unusually and unreasonably low, both in and of themselves and relatively, and if put into force and effect will compel appellant to accept the same on both interstate and intrastate traffic and "will not yield to complainant a fair or reasonable compensation for the service performed, *and will deprive complainant, without due process of law, of the fair and reasonable return, which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment.*" (First Amended Bill, Clause 8, Tr. 81-2; Compton's affidavit, Clause 8, Tr. 57-8; Goodwyn's affidavit, Clause 9, Tr. 64.)

16. The rates prescribed by the Commission are *arbitrary and void*, because made *without any evidence* whatever showing or tending to prove appellant's existing rates are unjust, unreasonable, or extortionate, or that the former special rates adopted by the Commission are just or reasonable.

These *facts* are distinctly alleged in the original bill as amended and not controverted by answer, but stood admitted on the general demurrer.

The allegations in the bill on the latter point are as follows, speaking of the testimony in the proceeding before the Commission:

> There was *no testimony* by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that be-

came effective on the lines of railroad of complainant on March 10, 1910, and that have been charged, collected, and received by it for such service of transportation on the commodities named on and subsequent to said date, and *no evidence* was adduced in said proceedings that established the unjust or unreasonable nature of said rates or of any of them, or that said rates or any of them were or are extortionate. (Tr. 15-16.)

Again the bill charges:

There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky, or between the points of origin and of destination aforementioned, were in and of themselves unjust, unreasonable, or extortionate. (Tr. 19.)

Still further (Tr. 20):

This complainant states absolutely that the evidence adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distillery purposes and it states that *no evidence whatsoever* was adduced at the hearing or investigation aforesaid which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

17. Upon the same grounds the order granting reparation, if for no other reason, is void. The bill avers (Tr. 18):

> And the Commission did then find it to be a fact, *without any evidence whatsoever* having been presented before it in support thereof, that the complainants who are hereinbelow named, had paid to defendant (being complainant herein) the following sums in excess of just and reasonable rates for the transportation of said commodities, to and from said points, respectively, and that each of said complainants hereinafter named was by said order awarded sums respectively set opposite their names.

(Here follow in the bill the names of eighteen of the complainants and the amounts awarded to each of them.)

Again the bill charges (Tr. 19):

> *nor was there any evidence* introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from this complainant on account of previous payment by them, or any of them, of alleged unjust or unreasonable or extortionate rates.

The answer in the proceeding before the Commission denied that either of the plaintiffs was entitled to recover any sum of defendant by way of reparation. (Tr. 34-35.)

The only statement of *fact* in the affidavit of either defendant Siler or defendant Finn, which, in the remotest degree, had any bearing upon the question of the reasonableness of complainant's existing rates or of those prescribed by the Commission, is the following:

> Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time, and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those herein complained of. (Tr. 66 and 67-8.)

We submit that the mere fact that an increase has been made by a carrier is no evidence whatever that the

rate as increased is unreasonable, nor does even a legal presumption arise from such fact that it is unreasonable.

It was said by this court in *Lake Shore & M. S. R'y Co.* v. *Smith*, 173 U. S. 684, 697:

> What the company may choose *voluntarily* to do (sell mileage books at reduced rates) furnishes no criterion for the measurement of the power of a Legislature. Persons may voluntarily contract to do what no Legislature would have the power to compel them to do. *Nor does it furnish a standard by which to measure the reasonableness of the matter enacted by the Legislature.* The action of the company upon its own volition, *purely as a matter of internal administration, and in regard to the details of its business*, which it has the right to change at any moment, furnishes *no argument* for the existence of a power in the Legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

In that case the court further held that a State may provide by legislation for maximum rates of charges for railroads subject to the condition that they must be such as will admit of the carrier earning a compensation that will be just to it and the public, and whether they are or not is a *judicial* question.

In *Interstate Commerce Commission* v. *Chicago Great Western R'y Co.*, 209 U. S. 119-120, the court said:

> *It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier.* The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor; *but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done.* Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

If any other *fact* had been brought out in the investigation before the Commission than the mere withdrawal of the former special rates on distillers' supplies, and the application of the present standard rates of appellant on the same commodities, for the same distances, whether in intrastate or interstate commerce, moving both ways, to every shipper uniformly and alike, surely the appellees Siler and Finn would have stated such other fact or facts in their affidavits made and filed three weeks after the filing of the bill herein, but they did not do so.

A rate may be unreasonably low or not afford just compensation, and on that account be unreasonable, still it may produce some return for the service performed. It has been claimed that rates should be regarded as reasonable merely because they will produce *some* revenue. On this point Mr. Justice McKenna, then circuit judge, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236, said:

> This is claimed to be established by authority. I do not think so. It seems to have been decided in the *Dey* case, 35 Fed. 866. But the same learned judge who expressed that view in the *Dey* case retracted it in the *Ames* case, 64 Fed. 165, and it has received no judicial sanction since.

In *Houston & Texas Central R. R. Co.* v. *Storey*, 149 Fed. 499, it was held in ruling upon demurrers, particularly special demurrers to the bills, which present questions of great importance to plaintiffs and the people, the court should give to the allegations a *liberal* construction, to the end that the court may, upon consideration of all the proof, decide whether the rates prescribed are *reasonable*.

The case of *Chicago, M. & St. P. R'y Co.* v. *Minnesota*, 134 U. S. 418, so often referred to with approval by this court in its subsequent decisions, was not a case of

confiscation at all. It involved simply the question of the *reasonableness* of certain intrastate rates on milk, which the Railroad Commission of Minnesota had recommended that the Chicago, M. & St. P. R'y Co. put in effect from two interior cities to St. Paul and Minneapolis, and said railway company refused to do so. Upon the hearing of the application of the Commission for a mandamus in the Supreme Court of that State the railway company asked for a reference to take testimony on the issue as to whether the rates fixed by the Commission were *reasonable*, but the court refused such a reference on the ground that the statute did not contemplate or allow any issue to be made as to the equality or reasonableness of the rates and awarded a peremptory writ of mandamus. It was such a statute which did not allow (thus construed by the highest court of the State enacting it) a *judicial* hearing upon an issue as to the *reasonableness* of the Commission's rates made in pursuance of its provisions, that the Supreme Court of the United States held to be unconstitutional and void, without due process of law, in violation of the Fourteenth Amendment, not because it did not allow such a judicial hearing on an issue as to whether the rates fixed by the Commission were *confiscatory*, for that issue was not made in that case.

So, we claim here that it is not incumbent on appellant to allege or prove a case of actual *confiscation*, resulting from the application of the rates herein complained of. If it were, it would have to perform the impossible (for no railroad carrier can show the expense of carrying one commodity or a few commodities and arrive at its net revenue thereon), and it would have to submit to every reduction in its rates made by the Commission, a few at a time, by piece-meal, as it were, however unreasonable they may be, simply because out of appellant's remaining rates or whole body of rates, freight and passenger, it may

be able to earn a fair return on the value of all its properties devoted to intrastate business in Kentucky.

We feel sure this court will not hold that appellant must suffer such reductions in its revenues on account of unjust and unreasonable rates made by the Commission, without redress in a court of equity.

On this point the court is cited to the following cases decided by the Supreme Court of Texas:

> *Gulf, C. S. & S. F. R'y.* v. *Railroad Commission*, 113 S. W. 740;
> *S. C. on rehearing*, 116 S. W. 796;
> *Railroad Commission* v. *H. & T. C. R. R. Co.*, 38 S. W. 755.

In *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, this court, after holding that a railroad company may reasonably be required to furnish certain *facilities* and *conveniences* for the general public, even if the same afforded directly no increased income or involved an expenditure without direct compensating revenue, took care to say that its conclusion in that case was entirely consistent with a concession that rates fixed by a State Commission *on certain commodities might be so unreasonably low as to be unconstitutional, although the entire schedule of rates yielded an adequate return*, and with the further concession (page 26) that

> a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for *a wholly inadequate compensation a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier.*

To the same effect is the case of *Southern R'y Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, where the carrier was held to be entitled to a reasonable compensation or profit for a particular service over and above the cost of performing the same.

The court below held in substance that in a case concerning rates, before it can be claimed by a carrier that it is deprived of its property without due process of law, it is necessary to allege and show that the rates fixed for its observance by a Legislature or Commission are *confiscatory;* that an allegation that such rates are unreasonable and unjust for the service performed is not sufficient to entitle the complainant to relief in a court of equity, using this language (Tr. 97; 186 Fed. 189):

> As regards the claim that the constitutional guaranty of due process is violated by the rate order, the inquiry is whether the bill and affidavits show that complainant would through enforcement of the new rates be deprived of property. No averment is made either in terms or effect that the new rates would not yield a profit to the carrier; much less that the entire business would not do so. In the absence of a showing that property is taken, the protection of this guaranty cannot be invoked. What may be a reasonable rate or return, as a matter of legal policy, having due regard to encouraging the investment of capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question.

Again, in the same connection, the court below states (Tr. 98; 186 Fed. 190-91):

> But the bill does not clearly tender an issue that can be said to involve confiscatory rates, and complainant's counsel state in their brief that complainant is not bound in this case to allege or prove that the new rates are confiscatory, and upon an oral argument the same counsel expressly disclaimed a purpose to rely upon any contention that the new rates are confiscatory.

What was conceded in oral argument by appellant's counsel was that the bill as amended did not claim the rates fixed by the Commission would result in the confiscation of appellant's property on its entire intrastate business in Kentucky, but, as alleged therein, such rates were unreasonable, unjust, arbitrary, discriminatory, and would not yield appellant a fair or reasonable compensation for the services performed, but would deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to said service or to the public use, with respect to such intrastate traffic, as well as to such interstate traffic, as was therein described, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Par. XX, Tr. 80-2.)

Appellant' bill in connection with its first and second amended bills shows what it *really* claims with respect to the rates complained of. We insisted in argument in the court below, as we insist in this court, it is not essential that appellant shall allege and prove the set of rates fixed by the Commission, if put into force and effect, will result in the confiscation of its property devoted to its entire intrastate business in Kentucky, under its whole body of intrastate passenger and freight rates on all classes and commodities in that State, before it is entitled to relief in a court of equity by injunction against rates that are unreasonable and unjust and which do not yield to it just compensation for the services performed.

We further insist that, on the question of the reasonableness of such rates, appellant is entitled to a *judicial* investigation and review. We do not understand this court to have ever held otherwise. We claim that to compel a carrier to accept, under the order of a Commission which is made final and conclusive, without the right of a judicial review, unjust and unreasonably low rates, or

those which do not yield it just compensation for the service performed, is *confiscation pro tanto,* and a taking of property without due process of law.

This court in the case of *Chicago, M. & St. P. Ry. Co. v. Minnesota,* 134 U. S. 456-7-8, speaking of the statute as construed by the Supreme Court of Minnesota, said:

> The rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the Commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, *although the Railroad Company is forbidden* to establish rates that are *not equal and reasonable*, there is *no power in the courts* to stay the hands of the Commission *if it chooses to establish rates that are unequal and unreasonable.*

And again:

> The *question of the reasonableness of a rate* or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is *eminently a question for judicial investigation*, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by *judicial* machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive

> reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

This case was expressly re-affirmed by this court in the late case of *Ex parte Young*, 209 U. S. 147, where this court said:

> *If the law be such as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional.* Chicago, etc. Railway Co. v. Minnesota, 134 U. S. 418.

As bearing upon the very point here under discussion we call attention to the case of *Louisiana R. R. Comm.* v. *Cumberland Telephone Co.*, 212 U. S. 414. That was a rate case originating in the Federal Court, and while it involved rates fixed by a State Commission, yet the court calls attention to the fact that the jurisdiction of the Federal Court was rested on the diversity of citizenship of the parties, as well as on the claim that the complainant's property was taken without due process of law; so that a Federal Court in that case could consider whether or not the *statute* or *constitution* of the *State* had been violated, as well as the question of the violation of the Constitution of the United States. Referring to this, this court said (Ib. 420):

> The single question before us is as to the character of the rates provided in Order No. 552, whether such rates are *confiscatory*, or, *if there is any difference*, whether the rates are only *unreasonable*, *unjust* and *inadequate*, although *not confiscatory*, and therefore not in violation of the Federal Constitution. The question under Articles 284 and 285 of the Constitution of Louisiana, *supra*, even of the *unreasonableness* of the rates, may be inquired into by a Federal Court, by reason of the diverse citizenship of parties to this suit, and the complainant is not confined to a State court upon this question. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

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> The complainant comes into court on *both grounds*, asserting that the rates are so low as to take its property in violation of the Fourteenth Amendment to the *Federal Constitution*, and *also* that the rates are so low as to be *unreasonable* and *unjust* under the above cited articles of the Constitution of Louisiana.

At common law a common carrier in Kentucky is entitled to just and reasonable compensation for the services it performs; and in the McChord Act itself and in Section 816, Kentucky Statutes (if still effective for any purpose, since it was held to be void for uncertainty so far as it prescribed a penalty for the offense of extortion in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132), the right of every railroad common carrier to a just and reasonable rate, toll, or compensation for the transportation of passengers or freight in Kentucky, is as distinctly recognized as if such right had been expressly declared and vouchsafed therein as it is in the articles of the Louisiana Constitution referred to in the case last cited.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 95, speaking of one engaged in a business where the State has the power to regulate the charges for his public service, this court said:

> Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because, by reason of the multitude, the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge

> is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for *each separate service* that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.

And when the contention was made in the recent North Dakota coal case that, notwithstanding the fact that the company was able to make a fair profit upon its whole business within the State, there was no constitutional power to require it to carry a particular commodity at cost or possibly below—in other words, where the constitutional right to measure the charge by the service was involved—this court expressly reserved the question, requiring that the disputed rates should be put into effect,

> but without prejudice to the right of the railroad company to re-open the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal.

(*Northern Pacific Ry.* v. *North Dakota*, 216 U. S. 580.)

In *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257, the question involved was the reasonableness of rates fixed by the State Commission on hard coal in car load lots. The carrier did not claim or show the rates attacked would be unprofitable. On this point this court said (Ib. 265) the rate complained of

> was not met by any showing that at the rates fixed by the Commission there would be no profit or an *insufficient* profit upon the coal so transported.

And further (Ib. 268):

> Obviously such a reduction could not be shown to be *unreasonable* simply by proving that, if applied to *all classes of freight*, it would result in an *unreasonably low rate*.

One of the questions in that case was "whether the tariff fixed by the Commission (on coal) is wholly inadequate and not compensatory."

The court below in the case at bar quotes the following clause from Mr. Justice Brown's opinion concerning the question above quoted in that case, occurring at page 267 (Tr. 98):

> *While we have never decided that the Commission may compel such reductions*, we do not think it beyond the power of the State Commission *to reduce* the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission *in this particular*.

Judging from the context this comment may have referred to the power of the Commission to require the carrier to reduce its rates to meet competition, but, in any event, it seems to us, the latter part of this clause was clearly a *dictum* upon a question of power in the Commission not presented for the decision of this court, which decided the case upon the ground that the railroad company had failed to establish the fact of the unprofitableness or unreasonableness of the rate complained of which it had attempted ineffectually to prove.

It is clearly indicated by this court, in that case, however, that had direct or competent testimony of facts showing the unprofitableness or unreasonableness of the particular rate contested been introduced, it would have been held to be admissible, and the fair implication from the opinion is that, if such testimony had been sufficient for that purpose, the rate in controversy would have been set aside on that account.

It may, therefore, be fairly claimed that the proposition that a common carrier has a right to charge and

collect just and reasonable compensation for each service has never been rejected by this court. The cases in which this court has defined the jurisdiction of a court of equity to inquire into the facts on which the Interstate Commerce Commission or a State Commission based its action have been cases where the wisdom of a mere regulation or practice of the carrier, and no question of the reasonableness of rates or constitutional rights, was involved. (*Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452; *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, Ib. 481; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.*, 220 U. S. 235).

We here quote from the forcible argument and apt illustrations employed by a distinguished attorney in a case before the Commerce Court involving the power of the Federal Courts to review an order of the Interstate Commerce Commission fixing rates for the future observance of a carrier, which are alleged and shown to be unjust and unreasonable although not confiscatory, in the sense that word is ordinarily used, as follows:

> The Constitution of the United States vests in Congress the power to prescribe rates for the transportation of interstate commerce, subject, however, to the limitation that no person shall be deprived of his property without due process of law. Under this grant of power Congress has prescribed a rule with reference to such rates, to-wit: that they shall be "just and reasonable," and has created a Commission, called the Interstate Commerce Commission, and has authorized it, under certain conditions named in the Act, to fix such rates within this rule. The rule applies equally, whether the rates be fixed by the carrier or by the Commission. The Commission has fixed certain rates and has ordered that they shall continue for two years. It is insisted by the carrier affected that they are not just and reasonable, and that they are not, therefore, within the limitation prescribed for the Commission by the statute. In re-

sponse, it is urged that the Commission is the sole judge of whether or not rates are reasonable, unless it can be shown that they are unconstitutional, to-wit: confiscatory. In other words, it is insisted that the courts may determine whether or not the Commission has violated the limitation imposed by the *Constitution*, but that they can not determine whether or not the Commission has violated the limitation imposed by the *Act of Congress*. If this be true, then we see no escape from the proposition that Congress has delegated to the Commission the *sole power which Congress itself has* over the subject of prescribing rates for the future, and such a delegation of power, we submit, is unlawful.

Let us suppose a case: Suppose Congress itself should undertake to fix a rate and that this rate should be attacked as unlawful. We may well suppose the following colloquy might occur in such a controversy in testing the validity of the Congressional action:

Q. Is the power of Congress to prescribe rates for the future a limited or an unlimited power?

A. It is a limited power.

Q. By what is it limited?

A. By the Constitution.

Q. Suppose it be claimed that Congress has passed the limitation placed upon its power by the Constitution and has made a rate that is confiscatory, thus depriving a carrier of his property without due process of law, *who then is to determine this question?* Is Congress alone to determine it, or must the courts determine it?

The old advocates for the independence of Congress asserted that the legislative power, the judicial power, and the executive power of the Government were co-ordinate, and that, therefore, when Congress acted there was no power in any court to determine whether or not its action was valid. The Supreme Court of the United States, however, in the case of *Marbury* v. *Madison*, 1 Cranch, responded to this claim with the following language which has never been answered, to-wit (p. 176):

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if

these limits may, at any time, be passed by those intended to be restrained?"

And again, in answering the doctrine of the Congressional advocates, the court said (Ib. 178):

"It (this doctrine) would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

That reasoning by Chief Justice Marshall satisfied the American mind and from that day to this it has been an undisputed proposition that the courts of the United States can consider and determine whether or not an Act of Congress is in excess of the power given to Congress. And it is solely on that ground, and under the reasoning just mentioned, that a federal court to-day would have the power to say that, in fixing a rate for transportation (claimed to be confiscatory), Congress has exceeded the limit placed upon its power by the Constitution.

Then let us go one step further. Suppose that, instead of Congress attempting itself to fix a rate, it has prescribed a rule to the effect that all rates shall be "just and reasonable," and then has created a Commission and authorized it to fix rates *within the limitation of that rule*. And suppose when the Commission has thus fixed a rate, it is insisted that the same is unlawful, we could then imagine the following colloquy as occurring in such controversy:

Q. Is the power of the Commission to prescribe future rates a limited or an unlimited power?

A. It is a limited power.

Q. By what is it limited?

A. It is limited *both* by the Constitution, which limits the power even of Congress itself, and further by the Act of Congress which created the Commission.

Q. But suppose it be claimed that the Commission has *exceeded the limitations* thus placed upon its power, *who is to determine that question?*

> Our opponents in the case at bar answer this by saying that the courts can determine whether or not the Commission has acted in excess of the limitation imposed by the *Constitution*, but that they *can not* determine whether or not it has acted in excess of the limitation imposed by the *statute*. The course of reasoning which leads to this conclusion is inexplicable to us. We simply can not understand it. We do not comprehend upon what basis it rests. And treating the Act of Congress as the sole authority for the Commission, just as the Constitution is the sole authority for Congress, we may ask of the Commission, when acting within this expressly limited power, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Or again, with reference to the doctrine of our opponents, and merely substituting the word "Commission" for the word "Legislature" in Chief Justice Marshall's language, we may say, "It would declare that if the Commission shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. * * * It is prescribing limits, and declaring that those limits may be passed at pleasure."
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> We, therefore, insist on this line of reasoning, that this court has the power, and must exercise it, to determine whether or not the act of the Commission in prescribing future rates is within the limitation imposed upon it by the *statute*, which says that rates thus prescribed must be "just and reasonable," as well as within the limitation imposed by the *Constitution*.

If, in this quotation, we substitute "Kentucky Legislature" for "Congress" and "McChord Act" for "Act of Congress", and "State Commission" for "Interstate Commerce Commission", the foregoing argument may be well applied to the case at bar in support of the proposition that appellant is entitled to a judicial review of the order of the Kentucky Commission herein complained of, fixing, as it alleges, rates which are unjust and unreasonable for the services to be performed.

VI.

THE McCHORD ACT BY REASON OF ITS PENALTY PROVISIONS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF SECTION 1 OF THE FOURTEENTH AMENDMENT.

Errors assigned as V and VI will be discussed under this heading.

On the subject of burdensome penalties which preclude a resort to the courts to determine the reasonableness of rates, Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 100, said:

> Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?

Again at page 102 he said:

> It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only *after there has been a final determination of the validity of the statute*, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

The foregoing extracts from the opinion in that case were quoted in the recent case of *Ex parte Young* by Mr.

Justice Peckham reported in 209 U. S. 123, who, after doing so, proceeded at page 146 to state:

> The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employes of the company, the risk of imprisonment for years as a common felon.
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> See also *Mercantile Trust Co.* v. *Texas, etc., R'y Co.*, 51 Fed. 529-543; *Louisville, etc., R. R. Co.* v. *McChord*, 103 Fed. 216-223; *Consolidated Gas Co.* v. *Mayor*, 146 Fed. 150-153. In *McGahey* v. *Virginia*, 135 U. S. 662-694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all *the law is invalid*, although what is termed a remedy is in fact given. See also *Bronson* v. *Kinzie*, 1 How. 311, 317; *Seibert* v. *Lewis*, 122 U. S. 284. If the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, etc., R'y Co.* v. *Minnesota*, 134 U. S., *supra*. A *law* which directly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, *is also unconstitutional*. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.
>
> It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the Legislature is com-

plete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, *to close up all approaches to the courts*, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and, therefore, invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a *fact* which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the *jurisdiction of the Legislature is complete in any event.*

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possibly imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, *are unconstitutional on their face, without regard to the question of the insufficiency of those rates.*

By the McChord Act, should a railroad company, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense any sum not less than five hundred ($500) dollars, nor more than one thousand ($1,000) dollars, and upon a second conviction, in any sum not less than one thousand ($1,000) dollars, nor more than two thousand

($2,000) dollars, and for a third and succeeding convictions in any sum not less than two thousand ($2,000) dollars, nor more than five thousand ($5,000) dollars.

The said Act further provides that the circuit court of any county into or through which the line or lines of railroad carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

In the oral argument of this case in the court below the learned counsel for the appellees, while admitting the Commission had no *judicial* powers, contended the carrier, under the McChord Act, had choice of three courses, to-wit:

First, to obey the Commission's order and charge rates not in excess of those fixed by the order.

Second, to institute a suit in equity either in the State or Federal court within the ten days before the order becomes effective, or thereafter before the Commission has recommended that indictments be found, and try the question just as it is being done in this case.

Third, to decline to avail itself of equitable relief, *take chances* on the Commission not recommending indictments, and, should indictments be found, raise the constitutional questions by way of defense to the indictments.

The first course would mean an unqualified surrender of the carrier's rights to the Commission's rates, however unreasonable, confiscatory or discriminatory they might be.

The second course, so far as it relates to the carrier's right to institute a suit in a Federal court of equity, such

as this, is not, as already observed, by virtue of the Act or founded upon any provision therein, nor could it be. Its right to come into this court to contest the validity of the rates prescribed is based on the Federal Constitution and laws. The same access to the Federal court could be had and was availed of by the complainants in the *Minnesota Cases*, 134 U. S. 418, and 209 U. S. 123, but, nevertheless, this Court held the State statutes complained of therein to be unconstitutional and void.

The Act in question makes no provision for a suit by the carrier in a State court of equity, or any other court, to determine the reasonableness of the rates fixed by the Commission, or to supersede, suspend or enjoin their enforcement until that question of fact can be decided. It would, therefore, be entirely within the *discretion* of a State court of equity to withhold such relief, pending the suit. Appellant insists that the Act itself should provide *expressly* for an adequate judicial remedy, and that it is entitled thereto, *as a matter of right*, in the administration of "*due* process of law." If the State court of equity should refuse, as it may upon the application of the carrier, to enjoin the Commission from enforcing the rates prescribed by it, or to allow the carrier to supersede or suspend their operation pending the suit or until the question of reasonableness can be finally determined, by the execution of a bond or on other equitable terms, the rates complained of would go into full force and effect at the end of ten days after notice to the carrier or one of its employes. Meantime, the carrier would be at the mercy of the Commission, besides sustaining a daily loss, with no way to recover any part of it back, where the rates are unjust and unreasonable for the services performed.

The third course, suggested by appellees' counsel, that the carrier "*take chances* on the Commission not recom-

mending indictments;" in other words, on the Commission not discharging its sworn official duty (Section 821, Ky. Statutes), would be taking a fearful risk, which might result disastrously, not only for itself, but for its officers, agents and employes. But it is further suggested by appellees, if indictments are found, the carrier can "raise the constitutional questions by way of defense thereto." That is an extremely doubtful proposition. Nothing in the Act so provides, and if it contained such a provision, it would be simply a travesty of judicial procedure.

Appellant, as it alleges in its bill, owns and operates its lines in 57 counties of Kentucky. It has over 800 stations on these lines, at perhaps 500 of which its has agents whose duty it is to charge, collect and receive rates on intrastate freight. Thus, all of these agents may be indicted by grand juries on the Commission's recommendation, in their respective counties, for having in one day, perhaps the same day, charged, collected or received a higher rate on a separate intrastate shipment than that fixed therefor by the Commission. The penalty against each of them on conviction for the first offense can not be less than $500, and may be $1,000. Thus, fines aggregating from $250,000 to $500,000 might be imposed upon complainant's freight agents in Kentucky for one day's violations by each, or for their *first* offense. Certain decisions of the Kentucky Court of Appeals, construing similar acts, with respect to penalties, are cited by appellees' counsel, but the cases referred to are not parallel, for, in the statutes involved therein the penalties were aimed alone against the person or company indicted, while here not only the carrier but every one of its officers, agents and employes (hundreds in number) are subject to the heavy fines prescribed by the McChord Act, and each can and may be prosecuted for committing his own first, sec-

ond, third and subsequent offenses for having charged, collected or received a rate on a single shipment, in excess of that fixed thereon by the Commission's order; and a plea by one agent that another agent had been convicted of a similar offense, and since that conviction he (the agent making such plea) had not committed a like offense with respect to a separate and distinct shipment, would be unavailing as a bar to his own conviction. The three cases cited by appellees' counsel (in which the statutes construed were framed quite differently from the McChord Act) do not hold to the contrary. (*Wilson* v. *Commonwealth*, 26 Ky. Law Rep. 685; *Brown* v. *Commonwealth*, 100 Ky. 127; *Commonwealth* v. *Standard Oil Co.*, 120 Ky. 724.)

Nor does the Supreme Court in *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, hold otherwise. It is, therefore, an erroneous construction of the McChord Act to say that all violations of the Commission's order fixing rates thereunder prior to the first conviction of the carrier or of any of its officers, agents or employes constitute but a single offense, the maximum penalty for which is a fine of $1,000. Accepting, for the sake of argument, the construction which appellees place on the penalty clauses of the McChord Act, that the second offense to be punishable must be committed after the first conviction, the possible fines inflicted on appellant's agents therefor could not be less in the aggregate than $500,000, and might reach $1,000,000, and upon a third and each succeeding conviction they would amount to not less than $1,000,000, and might be as much as $2,500,000. These enormous burdens do not take into consideration the penalties which might be imposed upon the appellant itself and its officers, under the provisions of the Act. So, it is plain the doctrine laid down by this court in *Ex parte Young*, *supra*, with respect to the Minnesota statute, is applicable to the pen-

alty features of the McChord Act, which were clearly intended to "close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the Commission's order are not *too low*, and, therefore, invalid." The intended intimidation is as complete in the one case as in the other. While it is true no indictment against the carrier can be found by a grand jury unless recommended by the Commission (*Illinois Central R. R. Co.* v. *Commonwealth*, 23 Ky. Law R. 1159, 64 S. W. 975), the power is placed in its hands to set on foot hundreds of prosecutions against the carrier and its officers, agents and employes at the same time in every county in Kentucky in which the carrier's lines are owned or operated, thus completely paralyzing and destroying the carrier's power to carry on its business, unless it puts into effect the rates prescribed.

Of course, to enforce the rates in controversy here, the indictments would be in fewer counties and against fewer agents than if the reduced rates applied over all lines of the appellant in the State.

The statements of Commissioners, Siler and Finn, in their affidavits (Tr. 65 and 69) that they had not threatened to recommend indictments or institute criminal proceedings against appellant, and they do not intend to take any step looking to such criminal prosecutions for violations of the Commission's orders can not avail to prevent the granting of an injunction herein. It is their sworn official duty to take such steps. (Section 821, Kentucky Statutes.) It is not necessary to establish the fact that threats have been made. Besides they may and can change their minds at any time. Although, in the order of September 26, 1910 (Tr. 44), appellees had further time to file the affidavit of the other Commissioner (Tarlton) it was not filed. The present Commissioners can not bind

their successors in office, who will all be elected in November, 1911.

Appellees Siler and Finn in their said affidavits say they are advised and believe the Statutes of Kentucky afford ample opportunity to test the validity of the Commission's orders in the Civil Courts, but neither they nor their learned counsel point out where any statute of that State may be found. Furthermore, they cannot do so, for none exists. Yet, the court below in its opinion appears to hold that these affidavits, and the supposed lack of an averment in the bill that the rates complained of are confiscatory, operate to save the McChord Act from being held invalid on its face by reason of the enormous fines and penalties therein prescribed. (Tr. 101-2).

In this connection the court below again refers to the case of *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91, as authority for the proposition "that an order fixing *just rates* could be enforced in Kentucky by civil action." Nothing of the kind was decided in that case. That was not a rate case at all, and, as we have already seen, related solely to the enforcement of a special statute imposing the duty upon a railroad company to operate daily, except Sunday, at least one passenger train over its line each way, the suit having been brought in the name of the Commonwealth for that purpose by the Commonwealth's Attorney.

Section 273, Civil Code of Kentucky, also cited by the court below (Tr. 101), to sustain this proposition, has no application whatever, as it only provides when and by whom injunctions may be granted.

The impossibility of submitting a question of this character to and having it properly tried and determined by a jury in either a civil or criminal court has been settled in the following cases:

Louisville & Nashville R. R. Co. v. *Railroad Commission of Tennessee*, 19 Fed. 679.

Windsor Coal Co. v. *Chicago & Alton R. Co.*, 52 Fed. 716.

Van Patten v. *Chicago, etc., R'y Co.*, 81 Fed. 545.

Ex parte Young, 209 U. S. 164-5.

Upon the trial of indictments before juries, and in accordance with the ordinary criminal procedure, the railroad company would be given, according to the contention of appellees' counsel, the right of laying before the jury the complicated and intricate details of its operations and earnings for the purpose, if possible, of convincing the jury that the rate fixed by the Commission is unreasonably low. If in any case it succeeds in establishing this fact, it is simply relieved from the *penalty for that one shipment*. The rates still exist as a constant invitation to further indictments, and the company can have no assurance that the next jury may not decide on the same evidence that the Commission's rate is reasonable. If in any case the company fails to satisfy the jury that the rate is unreasonably low, the result is not *to require* the railroad company to charge that rate for the future, or to furnish it with any certain guide as to whether it should do so, but is to impose upon it a very heavy penalty for its having done the only thing it could do in order to bring about a judicial hearing in the statutory method, *i. e.*, declined to charge, collect or receive the rate fixed by the Commission. Surely, if a railroad company has any real constitutional right to a judicial investigation as to the reasonableness of rates fixed by a Commission, this sort of procedure is illusory and worthless. A favorable decision gives the company no protection for the future; an unfavorable decision imposes a heavy penalty upon it for having invoked judicial protection.

As a practical matter, therefore, the right, even if it exists, to have an inquiry upon the trial of an indictment into the reasonableness of the Commission's rates, would be absolutely of no value to the railroad company. The questions involved are so intricate, the results of jury trials, even of cases of the greatest simplicity, are so uncertain, and the penalties imposed are so severe that no railroad company could afford to refuse to comply with any rate which the Commission might make, and the result of the Act, with any such construction, would be exactly what was the obvious purpose of the Legislature—and that is, that the railroad companies should be *compelled* to charge the rates imposed by the Commission, no matter how low they might be. This is not *due* process of law, and it amounts to a denial to appellant of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment, as claimed in its bill.

But appellees' learned counsel say the *Ex parte Young Case*, 209 U. S. 148, differed from the case at bar and assert that the parenthetic clause used by Mr. Justice Peckham, "no prior hearing having ever been given," does not apply here as appellant had a hearing before the Commission. In using the phrase quoted, Mr. Justice Peckham manifestly meant no prior *judicial* hearing had been given. In "due process" the *form* of the hearing is often of more importance than the hearing itself, especially where, to use the language of Mr. Justice Peckham in the same opinion, "the validity of the Act depends upon the existence of a *fact* which can be *determined only after investigation* of a very complicated and technical character."

By this is meant a *judicial* investigation, for he is there pointing out the distinction, which he states is obvious, between an act, the validity of which depends on the existence of a fact, and "the ordinary case of a statute upon

a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event" (Ib. 148).

He further states:

> The provisions of the former class of acts, relating to the enforcement of rates either for freight or passengers, by imposing such enormous fines * * * as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, *without regard to the insufficiency of those rates.* (Ib. 148.)

But, if upon the general principle alone, and in the absence of special statutory authority, it could be argued successfully that a mandatory injunction or other proceedings to enforce a rate order of the Commission are proper, and by way of *defense* thereto an opportunity for a judicial investigation of the validity of the order is afforded the carrier, nevertheless, in the absence of a statute, and in view of the penal provisions of the McChord Act applicable to the facts of this case, such a proceeding on behalf of the Commonwealth could not be exclusive or prevent a suit in equity by the carrier to enjoin the enforcement of the order of the Commission.

This is all the more true in the present case, because of the drastic penal provisions found in the statutes. The railroad company can not be compelled to await the action of the Commission, or of grand juries or prosecuting attorneys, nor can it be compelled to depend upon favor, or discretion, or kindliness of the Railroad Commission.

Indeed it would seem that a proper construction of the McChord Act would limit the duties of the Commission, so far as concerns the enforcement of orders made under the provisions of that Act, to prosecutions in the criminal court. The elaborate provisions found in that Act for indictment and prosecution for violations of its provisions

and orders made thereunder are in striking contrast with the provisions of Section 819, Kentucky Statutes, which it appears to have superseded after that section was declared to be unconstitutional and void (99 Ky. 132). That section contains a provision making the railroad company liable civilly for damages to the party aggrieved to the amount of damages sustained, including cost of suit and reasonable attorney's fees. There is no provision of that kind in the McChord Act.

If it is the duty of the Railroad Commission to see to the enforcement of the laws concerning railroads and of its own orders as provided in Section 821, Kentucky Statutes, then it is as much its duty to appear before grand juries and see to the prosecution of violations of the law and of its orders by indictment and punishment thereunder, as it would be to proceed through the civil courts. The former duty is expressly provided for by statute, as left to implication at most.

The appellant can not be deprived by inference alone, and in the absence of statutory prescription, of its right to be an *actor* in appropriate proceedings for having decided the validity of rate orders of the Commission by an appeal to the courts of the United States, substantially as it has done in the present case.

There is nothing, either in the statutes or in the decided cases, to deprive appellant of that right.

VII.

APPELLANT'S CONTRACT RIGHT TO CHARGE AND RECEIVE THE MAXIMUM RATES FIXED BY ITS CHARTER.

Error assigned as VII will be discussed under this heading.

In *Louisville & Nashville Railroad Company* v. *Commonwealth*, 99 Ky. 134-5, the Court, after holding Sections 816 and 819, Kentucky Statutes, defining and prescribing the punishment of a railroad corporation for the offense of extortion in charging, collecting or receiving more than a just and reasonable rate, to be void to the extent and for the reasons therein stated, concluded its opinion, as follows:

> It may be observed further, however, that it would seem *singular*, if such a statute, *even if in all respects valid*, could be enforced against a carrier whose rates, *as fixed in its charter*, are in excess of the rates alleged to be excessive in the indictment. And this, *not* because such rates are secured by *an irrepealable contract*, a matter not now considered, *but simply because they at least remain the legal rates until changed by law*.

There it is plain the highest court in the State meant to hold that even if Sections 816 and 819 were in all respects valid, appellant can lawfully charge and receive the maximum rates prescribed by its charter so long as they are in excess of those alleged to be extortionate in an indictment, not because of an irrepealable contract, "but simply because they at least remain the legal rates until changed by law." We maintain these maximum rates have not been "changed by law." To take away ap-

pellant's right to charge and collect them, there must be found a statute *expressly* repealing its charter in that respect.

So, in *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 225-6, the court on this point said:

> As applying especially to the Louisville & Nashville R. R. Co., the court is further of opinion that the Act can not be maintained, because, without attempting directly, and probably not at all, to repeal the provision of the charter of that company as to maximum rates, it still leaves it within the power of the Commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that, even if the charter of this company can be amended, it was done by *implication* by the Act before us.

Again, referring to the fact that appellant's charter was enacted prior to the Reservation Act of 1856, the court, in that case, raises a doubt as to whether its charter rates can be affected by subsequent legislation at all, without its consent, and proceeds to say:

> But whether so or not, it can only be done, if at all, *by language which is plain and unmistakable*, and not merely by so doubtful an *implication* as is presented here.

The contract between the State and appellant by virtue of the charter provision referred to remains in full force and effect until expressly revoked by an Act of the Legislature. The obligation of this contract can not be lawfully impaired in any other manner. To construe the orders of the Commission herein complained of so as to impair such obligation would be to work a violation of that provision of Sub-section 1, Section 10, Article 1, of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts," which is relied on by appellant in its amended bill. (Par. Tr. 78-80.)

While appellant has not, since its acceptance of the provisions of the present State constitution in 1902, an irrepealable contract with the State by the terms of which it has the right to charge and collect rates within the limits of its charter, it nevertheless has a contract which remains in force until expressly repealed. That contract made on March 5, 1850, when appellant's charter, by the Legislature was granted and approved by the Governor, nearly six years prior to the Reservation Act of 1856 (providing that all charters thereafter granted were subject to alteration, amendment or repeal), did not become repealable by the Legislature until appellant accepted the present State constitution on July 11, 1902, more than two years after the passage of the McChord Act on March 10, 1900. How appellant's charter provision with respect to maximum rates can be regarded by this court as repealed by the McChord Act, when at the date of the passage of the latter Act, admittedly no part of appellant's charter was subject to alteration, amendment or repeal by the Legislature, and did not become so subject until more than two years thereafter, we are unable to understand. It is not pretended by appellees' learned counsel, nor is it a fact, that the Legislature has passed any statute *since* July 11, 1902, which expressly or by implication, repealed the maximum rates provision in appellant's charter.

Section 573, Kentucky Statutes (relied on by appellees' counsel as a repeal, effective September 28, 1897, of the maximum rates provision in appellant's charter), is not applicable. That section is a part of the Corporation Act, approved April 5, 1893 (Carroll's Kentucky Statutes, Ed. 1909, pp. 380, 394), at which date said provision in appellant's charter, which was approved March 5, 1850, was not subject to repeal, nor did it become so until July 11, 1902,

more than nine years thereafter and nearly five years after the effective date of said repealing act.

But the Court of Appeals in 99 Ky. 142-3 said that appellant's maximum rates as fixed in its charter remained *"the legal rates until changed by law, not because such rates are secured by an irrepealable contract,"* a matter not then decided.

An instructive and decisive case on this question is that of *Pingree* v. *Michigan Central R. Co.*, 118 Michigan, 314; 76 N. W. 635.

In this connection the opinion of the Kentucky Court of Appeals, delivered June 12, 1908, in the case of *Louisville & Nashville Railroad Co.* v. *Robbins*, 33 Ky. Law Rep. 778; 111 S. W. 283, is in point. In that case a judgment was rendered by the Bullitt Circuit Court requiring the appellant, the Louisville & Nashville R. R. Co., to provide for appellee, Robbins, a proper wagon way across its right of way and railroad tracks so as to enable him to pass from one side of the railroad to the other, as he owned land on each side thereof, the duty to so provide such farm crossing being imposed upon appellant by its charter. But appellant set up the fact that it had in 1902 accepted the provisions of the present State constitution and that by reason thereof the provisions of its charter requiring it to construct farm crossings in such cases were repealed by the Kentucky Statutes on that subject, and those statutes, which were different and did not so require, took the place of said charter provision. The court, however, took a different view and said:

> In our opinion, the laws found in the Kentucky Statutes, with reference to farm crossings, were not intended to, and did not have the effect, to repeal the provisions of appellant's charter referred to. Appellant obtained its right of way through the State by virtue of its charter, it received donations of right of way, purchased and condemned the balance of the

> right of way, with the provision in its charter requiring it to construct such farm crossings, *thus entering into and forming a part of the contract* by which it obtained the right of way upon which to construct its road. This was an inducement, probably, to some to give right of way and induce others to sell at a less price, and in all probability lessened verdicts in cases in which it condemned the right of way, and it can not evade this liability which it assumed when it accepted its charter.
>
> For these reasons the judgment of the lower court is affirmed.

Now, if appellant must still bear the *burdens* and *liabilities* imposed upon it by its charter, notwithstanding its acceptance of the new Constitution, it is likewise entitled to the *benefits* and *privileges* granted by its charter, and nothing short of an express and absolute repeal, by an Act of the Legislature, can take away and destroy its right to charge and collect the maximum freight rates prescribed in its legislative charter, for that provision, too (as does the provision concerning farm crossings), still forms "a part of the contract" with the State, although such contract, in that respect, is subject to the right of the State to repeal it, but which right the State, since July 11, 1902, has not yet exercised by *express* enactment, nor by *necessary implication* from any existing general statute.

Practically all the authorities referred to in appellees' brief on this branch of the case are cited to support the proposition that the State of Kentucky did not make an *irrevocable* contract with appellant in granting it the right to charge and collect certain maximum freight rates as set out in its charter and the amendments thereto enacted prior to the Reservation Act of 1856. Many of these cases, however, do not sustain appellees' contention in that respect, but do support a different view, notably the *Sanford case*, 164 U. S. 586, where the contract was not

upheld on the ground, as the court held, it had not passed from the old to the new company.

Since appellant, in 1902, accepted the provisions of the present State Constitution, it is not insisted that it is any longer beyond the power of the Legislature to *expressly* repeal those provisions in its charter granting it the right to charge and collect certain maximum freight rates. It is claimed, however, that the Legislature has *not yet exercised that power*, and so long as it refrains from enacting such a repealing statute, its contract with the State in that respect remains unimpaired, and this is practically decided in the cases above cited of *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 142-3; *same* v. *Robbins*, 33 Ky. Law Rep. 778, 111 S. W. 283; *same* v. *McChord*, 103 Fed. 216, 225. These cases directly hold in effect that appellant's charter privileges have not been, and can not be, repealed by *implication* or general laws not made *expressly* applicable thereto.

The court below refers to Section 573, Kentucky Statutes, a part of the general corporation Act enacted April 5, 1893, which provides, in substance, that all provisions of all charters of corporations, inconsistent with that Act, to the extent of such conflict, and all powers, privileges or immunities of any such corporation, which could not be obtained under the provisions of said Act of April 5, 1893, should stand repealed on September 28, 1897 (nearly five years before appellant on July 11, 1902, accepted the present Constitution); and also refers to Section 816, Kentucky Statutes, undertaking to define "extortion," which was held void, as a penal statute, by the Court of Appeals in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132, as probably working an *implied* repeal of appellant's charter provision fixing its maximum rates. Now, there was nothing in the Act of April 5, 1893, inconsistent or in conflict with appellant's said charter pro-

vision, so that Act did not operate to repeal the latter provision, as of September 28, 1897; and, furthermore, as above stated, said provision in appellant's charter did not, in any event, become repealable until July 11, 1902.

But the court below, apparently doubtful of its view that a repeal of the maximum rate provision in appellant's charter, was effected in that way, observes (Tr. 103):

> Even if complainant's right to maintain its charter rates was not repealed by Section 573 in connection with 816, it is clear that such right was repealed through enactment of the McChord law and complainant's subsequent acceptance of the provisions of the Constitution.

Now, if the McChord Act be invalid upon the grounds hereinabove urged, of course it did not work an implied repeal of the rate provision in appellant's charter. But if that Act be valid, it was enacted more than two years before appellant's charter provision became repealable, and there is no attempt therein to repeal said provision and the maximum rates prescribed in that provision (as the Court of Appeals has said in 99 Ky. 134-5) "remain the legal rates until changed by law." The case cited by the court below, *Missouri Pacific Ry. Co.* v. *Kansas*, 262, 274, does not appear to us to be conclusive against appellant on this point. There appellant claimed it had a contract right with the State, giving it the power to determine the time and manner of operating its trains, but conceded such contract was repealable when the Act was passed giving the Railroad Commission power over the same subject-matter. So this court said:

> The proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract.

But our concession does not go so far. We contend the Legislature on March 10, 1900, when it enacted the McChord Act, had no power to repeal the maximum rates provision in appellant's charter expressly or by implication, and has not attempted to do so in any Act *since* July 11, 1902, when by appellant's acceptance of the Constitution, said provision in its charter became, for the first time, repealable.

We further insist that by its legislative order of August 10, 1910, the Commission unlawfully undertook to impair appellant's existing contract with the State, whereby it was entitled to charge and collect rates within the maximum fixed by said provision.

It is alleged in appellant's first amended bill, after setting out the nature and terms of its said contract (Par. XIX, Tr. 80) that the Commission claimed such power under the McChord Act, and that said Act "*so construed* and the orders of August 10, 1910, in pursuance thereof, and herein complained of, impair the obligation of the contract," etc.

Appellant nowhere in this record concedes that this *construction* by the Commission of the McChord Act is the true and correct one.

VIII.

THE CERTIFICATION AND FILING OF THE ORDER OF AUGUST 10, 1910, AWARDING REPARATION TO THE PARTIES NAMED THEREIN SHOULD HAVE BEEN ENJOINED BY THE COURT BELOW.

Under this heading we will discuss errors assigned as IX, X and XI.

In its opinion the court below said (Tr. III):

> We do not pass upon the validity of the second order of the Commission. We think that the persons and companies in whose favor awards of reparation appear by the order to have been made are necessary parties in interest. They have not been brought into this suit.

This order awarding reparation to the parties who instituted the proceeding against appellant before the Commission will be found in the transcript of the record (pp. 29-30). It was made by the Commission, under the erroneous impression that Section 829, Kentucky Statutes, applied to a proceeding under the McChord Act. That section with other sections of the Kentucky Statutes referred to in this brief, will be found in an Appendix thereto for convenient reference.

It was asserted in the oral argument of appellees' counsel in the court below that if an action in the name of the Commonwealth for a writ of mandamus or to compel the carrier to obey the order of the Commission with respect to rates would *not* lie, then the Commission would have power to make an award under Section 829, Kentucky Statutes, which it is stated this Court in *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, found

to be still in force and applicable to the offense of extortion created by the McChord Act, and would also have the power to institute proceedings in court to enforce that award. Now, the court will find that in the case referred to this Court did *not* hold that Section 829, Kentucky Statutes, was still in force. The invalidity or enforcibility of that section was not in issue or before the court in that case. The only reference we have been able to find in the opinion of Chief Justice Fuller in that case concerning Section 829, is as follows (*Ib.* 490):

> By Section 829 the Commission was empowered to hear and determine complaints under Sections 816, 817 and 818 and to enforce their awards in the courts.

The applicability of that section to complaints under the McChord Act was not touched upon by this court, nor was the validity of the restrictions or limitations on the carrier in defense of claims awarded by the Commission, under the three sections mentioned, considered or passed on by this court.

The order awarding reparation is attacked by appellant on three distinct grounds, viz:

1. That the power of the Commission, if any it has, to award reparation is confined by the express terms of said section in proceedings where

> "the Commission shall hear and determine complaints under Sections 816, 817 and 818."

Those three sections and section 829 are parts of the Act approved April 5, 1893. Section 816 was declared void as a penal statute in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132; and Section 818 was declared void as a penal statute in *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 20 Ky. Law Rep. 491-2, leaving only Section 817 which defines and deals alone with *unjust discriminations*.

It is practically conceded by appellees that the complaint of the Greenbrier Distillery Company and others against appellant before the Commission was made and filed under the McChord Act, approved March 10, 1900, and not under either of the three sections named in the outset of Section 829.

2. That Section 829 in unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein with respect to the trial in the Circuit Court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

> If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the Court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence.

3. That said award is arbitrary and void, as appellant alleges, because *no evidence* was introduced or considered by the Commission showing or tending to show the plaintiffs in the proceeding aforesaid had paid to appellant any sum or were entitled to receive as reparation on account of previous payment by them, or either of them, of alleged unjust, unreasonable or extortionate rates. (Tr. 18-19).

These *well pleaded facts* were not controverted by answer, but admitted by the general demurrer as true, and should have been so considered on the hearing of the motion for an interlocutory injunction.

Concerning the first objection to the validity of said order of reparation we claim that the foregoing section has no longer any operative force; that in point of fact, by reason of the decision of the Court of Appeals in *Louis-*

ville & Nashville Railroad Company v. *Commonwealth*, 99 Ky. 132, holding Section 816 of the Kentucky Statutes unconstitutional and void for uncertainty, so far at least as it is to be taken as a penal statute, Sec. 829 has since had nothing to operate upon.

Carroll's Kentucky Statutes, Edition of 1903, (which so far as the sections thereof pertain to the Railroad Commission's powers and duties, are the same as his Edition of 1909), was adopted by an Act of the Legislature, approved February 29, 1904 (Session Acts 1904, pp. 26-27), as is shown by Section 2290b of the latter edition. (See Appendix).

The court's attention is called to the qualifying clause or proviso to said adopting Act (Section 2290b), as follows:

> *Provided*, That this Act shall not be construed to render valid any *invalid* chapter or section or part thereof embraced in said statutes.

So, Secs. 816 and 819, held to be unconstitutional and void for uncertainty in the case last referred to, decided April 4, 1896, and Sec. 818 held to be likewise void in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, *supra*, decided June 23, 1898, are still void, and were not validated by said Act of the Legislature adopting Carroll's Edition of 1903 (now Section 2290b, Edition of 1909).

But, if that be not true, and Sec. 829 is to be treated as an existing statutory provision, it is, nevertheless, unconstitutional, because in the first and only *judicial* inquiry, concerning the unreasonableness and unjustness of rates for the collection of which reparation is to be awarded, the right of the parties to introduce all material and relevant evidence, and to the carrier to make all its legal defenses is prohibited by that section, which by depriving such carrier of its right to be heard and to make its de-

fenses, denies to it due process of law in violation of the Fourteenth Amendment.

a. By its express terms Section 829, so far at least as claims for reparation based upon the alleged extortionate nature of rates charged and collected are concerned, applies alone to Section 816 of the Kentucky Statutes. Thus it begins:

> The Commission shall hear and determine complaints under Sections 816, 817 and 818. *Such* complaints shall be made in writing, etc.

It is not competent, therefore, for the Commission to apply the provisions of Section 829 to any proceeding under the McChord Act. It will be remembered that, under the latter Act (Section 820a), the offense of extortion consists in the railroad company or corporation, or any officer, agent or employe thereof charging, collecting or receiving *a greater or higher rate, toll or compensation than that fixed by the Commission, as in said Act provided.* And in such case not only is the corporation or company, but all the officers, agents or employes thereof collecting, charging or receiving such rates are to be deemed guilty of extortion. But there can be no extortion or reparation except for amounts charged and received *after* the effective date of the commission's order, and then only for the amount charged and collected in excess of the rate fixed by that body.

Under the terms of Section 816, on the other hand, the offense of extortion consists in the Act of the "railroad corporation" charging, collecting or receiving more than a just and reasonable rate, toll or compensation. It follows, therefore, that the power of the Commission to make an award can be applied only to cases where it is shown that the railroad corporation has charged, collected and received more than a just and reasonable rate. In-

asmuch as neither Section 816 nor 829 expressly prescribe a standard of justness and reasonableness, it follows that there is no standard by which even the Commission can make an award, or the Commission must, in making the award, also adjudge the rate that was charged, collected and received to be unjust and unreasonable. If the former construction is the sound one, then Section 829, taken in connection with Section 816, must be declared void for uncertainty, under the ruling in 99 Ky. 132, *supra*. If the latter construction is the sound one, then we have the case of a commission, a mere administrative body, performing the *judicial* function of adjudging a rate to be unjust and unreasonable. At this point, however, we wish rather to emphasize the fact that the power provided in Section 829 for awarding reparation, so far at least as it relates to extortionate rates, applies alone to Section 816, and can not be applied to the provisions of the McChord Act which was enacted in the year 1900, long after Section 829 became a law, which was on April 5, 1893.

b. The McChord Act has been heretofore set forth *in extenso*. It contains no provision relating to reparation; indeed, its provisions are rigidly confined to the fixing of rates to be applied in the future and to the prosecution of companies, corporations, their officers, agents and employes for committing that offense, called "extortion," which consists in charging, collecting or receiving more than the rates so fixed by the Commission.

c. That the proceeding of the Greenbrier Distillery Company, *et al.*, complainants, v. Louisville & Nashville Railroad Company, defendant, before the commission, hereinabove set forth, was had under the provisions of the McChord Act will not we conceive be denied by the appellees.

This court will note that it was in the same proceeding, under the same title, upon the same pleadings and evi-

dence, that the orders of August 10, 1910, were entered; that in each of said orders it was adjudged that the rates theretofore charged, collected and received were unjust, unreasonable and extortionate. Thereupon, the one order proceeds to fix rates to be charged in the future, and the other order proceeds to award reparation for excess of rates alleged to have been charged and collected in the past.

Inasmuch, however, as the McChord Act contains no provision for awarding reparation, the attempt of the Commission in that respect was without authority of law, and the order awarding reparation is void.

If for any reason it may be thought the decision of the Commission that the rates charged, collected and received by the appellant, under its tariff of March 25, 1910, could be made under the provisions of Section 829, Kentucky Statutes, and that an award of reparation could then be made, all independently of the proceeding under the McChord Act, or at all, it is nevertheless true that Section 829 affords no basis therefor.

It will be remembered from the language of that section that the Commission is required to hear and reduce to writing all evidence adduced by the parties and to render such award as may be proper; moreover, if an award of the Commission is not satisfied within ten days after same is rendered, the chairman is required to file a copy thereof and the evidence heard, in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court is then required to enter the same on the docket for trial. Summons having been issued, as in other cases, against the party against whom the award was rendered, requiring it to appear in court within the time allowed in ordinary cases and to show cause why said award shall not be satisfied, it is further

provided that if the party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. But if a trial is demanded, the case shall be tried in all respects, as other ordinary cases in which the same amount is involved, provided that *"no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence,"* and the judgment and proceedings thereon shall be the same as in other ordinary cases.

Now, it is a fact that the Commission is an administrative body, and has no judicial powers. In order to make an award under Section 829, it must exercise the judicial function of hearing evidence and determining that a given rate that has been charged and collected is unreasonable and unjust and, therefore, extortionate. It must, moreover, perform the further judicial function of adjudging that the complainant is or not entitled to recover a given sum from the defendant. But inasmuch as the Commission is an administrative body, as was admitted by the learned counsel for appellees in the court below, the proceedings before the Commission, while it is hearing and determining the reasonableness of a rate, and the right of recovery by way of reparation, can not be considered as judicial proceedings. The greatest effect that can be given to them is that they are in aid of a court established by law for hearing and determining both questions.

The Congress of the United States has recognized the function of the Interstate Commerce Commission in this regard, and in providing that if the carrier does not comply with an order for the payment of money suit may be brought thereon in a circuit court of the United States,

which shall proceed in all respects as in other civil suits for damages, and therein the "findings and order of the Commission shall be *prima facia* evidence of the facts therein stated." (Sec. 16 of the Act to Regulate Commerce as amended June 18, 1910.) In such cases, of course, the defendant carrier would be given the opportunity of a hearing in that court, and allowed to introduce such other relevant evidence as it might choose to offer to be given such effect in overcoming the *prima facia* case made by the findings and order of the Commission, as the same would be entitled to.

By the provisions of Section 829, each party, both claimant and railroad company, is in the circuit court of the State, precluded from introducing all its evidence that may be relevant, material, or otherwise competent, and that is the only court in which such evidence might otherwise have been introduced or heard. That evidence might not have been produced before the Commission, or the Commission may have rejected it (though offered) erroneously on the supposition that it was incompetent or irrelevant, and such offered testimony would not, therefore, appear in the copy of the "evidence *heard* by the Commission," and it may even be that it could have been produced by the exercise of reasonable diligence, or the circuit court may not be satisfied, in spite of the sworn testimony to that effect that it could not have been produced before the Commission by reasonable diligence.

The effect of the statute is, therefore, to deny to the parties the right to introduce before the court, material and competent evidence affecting the matter in contest, and so far as concerns the carrier defendant, to deny to it the right to make a defense based upon such evidence.

A statute that does this denies to the carrier due process of law. It excludes by statute such evidence from consideration in the judicial investigation and does not

differ in principle from giving to the order of the Commission a *conclusive* effect. As was said in *Hovey* v. *Elliott*, 167 U. S. 407-413:

> The fundamental conception of a court of justice is to condemn only after hearing.

Wigmore on Evidence, Volume II, Section 1353, says:

> It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of *conclusive* evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province.

We submit that nothing could be stronger than this quotation from that learned text-writer. In truth, it is a judicial function to apply the law, and to apply the law necessarily involves the determination of the facts, and to withhold from the consideration of the judiciary a part of the facts or evidence in support of them, is to deny to the judiciary the power to determine the facts or to investigate the evidence as a basis for that determination. To withhold from the consideration of the judiciary some of the competent and material evidence, is indeed to forbid the judiciary to exercise an indestructible judicial function.

In *Birdsong* v. *Brooks*, 7 Ga. 88-92, the court in holding a statutory recital to be not conclusive, said:

> The Legislature has no power to legislate the truth of facts. Whether facts upon which rights de-

> pend are true or false, is an inquiry for the courts to make, under legal forms; it belongs to the judicial department of the government.

To give by legislation conclusive effect to any evidence of a fact affecting the matter in contention, or to exclude from the consideration of the court material evidence of a fact affecting the matter in contention, is in very truth to deny to the litigant the right to be heard in his own defense, and that is to deprive him of due process of law. To do either of said acts under compulsion from the Legislature is to do in principle what was condemned by this court in *Hovey* v. *Elliott*, *supra*. There the court, in its plenary power, to punish for contempt, refused to allow one to answer who had been guilty of contempt, and struck his answer from the files and suppressed his testimony, and condemned him without consideration thereof, and without a hearing, the court said:

> To say that the courts have inherent power to deny all right to defend an action and to render decrees without any hearing, then is, in the very nature of things to convert the court exercising such an authority into an instrument of wrong and oppression and hence to strip it of that attribute of justice upon which the exercise of a judicial power necessarily depends.

In the course of the opinion in that case, the court quotes with approval the language of Mr. Justice Field in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, as follows:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of the court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Then this court in *Hovey* v. *Elliott*, *supra*, goes on with these significant words, pages 414-415:

> That there must be a notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.

Further on page 417, this court continues:

> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

We refrain from referring to other authorities upon a proposition that seems so clear and indisputable.

Section 829 instead of providing denies to appellant the equal protection of the laws and deprives it of its property without due process of law, and is therefore void.

Again, it is stated in the brief of appellees' counsel that the Commission under its *general* powers can make an award and proceed to have it enforced in the courts. We do not, by any means, concede this proposition. On the contrary the Commission has no powers except such as have been *expressly* granted by the State Constitution or the Legislature. This has been repeatedly decided and settled beyond controversy.

In *Chicago, I. & L. R'y Co.* v. *Railroad Commissioners of Indiana*, 38 Ind. App. 439, the court, at page 459, states:

> The power possessed by the Commission is only such as the statute gives it. The method by which it is to proceed is pointed out. If this method is not pursued its action is a nullity. The whole proceeding is a special statutory one and certain steps must be taken before the Commission has any authority to proceed.

In *State* v. *Chicago, M. & St. P. R'y Co.*, 16 S. D. 517, 94 N. W. 407, the court said that railroad commissions "are mere creatures of the statute and possess no power except what the statute *expressly* confers upon them."

Again, in *Board of Railroad Commissioners* v. *Oregon Railway & Navigation Co.*, 17 Or. 65, 19 Pac. 702, it is said at page 75 of the former, and 706, 707 of the latter:

> The jurisdiction of such commissions is not given by *implication*. Commissions of that character are creatures of the statute and possess no power except what the statute *expressly* confers upon them.

The same principle is announced in the case of *Interstate Commerce Commission* v. *C., N. O. & T. P. R'y Co.*, 167 U. S. 479, 494.

In *Elliott on Railroads* (2d Ed.), Vol. 2, Sec. 684, the author states:

> The general rule is that the jurisdiction of a statutory tribunal will not be extended by implication except in cases where the implication necessarily arises from a consideration of the objects or language of the statute. The rule that, where new rights are created and new remedies prescribed, the construction of the statute creating such rights and prescribing such remedies shall be *strict*, is an influential one.

This court so decided this question in *Siler, et al.* v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175.

It will be observed that Section 829, Kentucky Statutes (if it were to be regarded as applicable or valid for any purpose), provides that the procedure to recover on any award made against a railroad carrier shall be as in an "ordinary" case in the circuit court, wherein the chairman of the Commission has filed a copy of the evidence heard by the Commission. An "ordinary action" under the Civil Code of Kentucky (Sec. 6) is an action at law. In the proceeding before the Commission brought by the Greenbrier Distillery Company and others, there were eighteen awards made, thus necessitating that many suits at law to be defended and tried out before a jury, in each of which the issue involved would require an investigation and determination of the reasonableness of appellant's existing rates and the unreasonableness of those prescribed by the Commission in lieu thereof. Yet the learned counsel for appellees, in the face of all the decisions, State and Federal, to the contrary, seemingly in earnest, tell us the appellant, under these circumstances and conditions, in a case of this nature, is afforded "*due* process of law" and has "an adequate remedy at law."

It is insisted that the court below erred in holding the Greenbrier Distillery Company and other plaintiffs in the

proceeding before the Commission were necessary parties defendant, and in not passing on the validity of the order of reparation because they had not been brought into this suit. Those plaintiffs had no right of action against appellant under the provisions of Section 829, even if valid, until the Chairman of the Commission filed a copy of the awards and the evidence heard in the office of the clerk of the Circuit Court of the county having jurisdiction. Such Chairman is the representative, in this respect, of said plaintiffs, and it was only necessary to make him a party defendant herein, and to enjoin him from taking such action. The restraining order granted upon the filing of the original bill and continued in force by the court below not only restrains the Commission from enforcing its first order of August 10, 1910, fixing rates for appellant's observance in the future, but also restrains the Chairman of the Commission from filing a certified copy of the awards made by its second order on the same date, with or without the evidence heard, in such clerk's office. (Tr. 40-42.)

The Greenbrier Distillery Company and other plaintiffs in the proceeding against the appellant before the Commission, which culminated in the entry of both of said orders, were no more necessary parties defendant in this suit with respect to the second order, than they were with respect to the first order. As heretofore pointed out, said orders really constitute but one judgment in the same proceeding at the same time involving the same controversy between the same parties. If we are correct in our contention that this second order, making awards as aforesaid, is illegal and void upon any of the grounds above set forth, the court below erred in not passing on its validity, and in denying appellant's motion for an interlocutory injunction enjoining the taking of any steps by the Chairman of the Commission looking to its enforcement.

If, however, this Court shall not reverse, but sustain the court below in its ruling that the eighteen corporations to whom said awards were severally made are necessary parties defendant to this suit, so far as it seeks to enjoin the enforcement of the second order referred to, then we respectfully submit that it would be proper and equitable for this court to direct the court below to allow appellant a reasonable time in which to bring said corporations into this suit, and, meantime, to continue said restraining order in force, in order to avoid a multiplicity of suits, which would necessarily result from permitting the Chairman of the Commission to file a copy of said eighteen awards in the office of the circuit court of the county having jurisdiction of such controversy.

IX.

THE ENFORCEMENT OF THE COMMISSION'S RATE ORDER SHOULD HAVE BEEN ENJOINED TO PREVENT UNJUST DISCRIMINATIONS AND UNDUE PREFERENCES, IN CONTRAVENTION OF THE PROVISIONS OF SECTIONS 817 AND 818, KENTUCKY STATUTES.

Under this heading errors assigned as XIII and XIV will be discussed. Section 817, Kentucky Statutes, prohibits a railroad corporation from directly or indirectly, by any special rate or otherwise, charging, collecting or receiving from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic.

Section 818 prohibits any corporation from making or giving any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or from subjecting any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage.

In its second amended bill appellant, in substance, alleges (Tr. 118-19) that *prior* to February 10, 1910, *its special rates on distillers' supplies*, or the articles and commodities set out in said order of August 10, 1910, were applied on *both interstate and intrastate traffic* to forty-eight stations in all on its lines in Kentucky, including the six-

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teen named in said order, where distillery plants were, have been since, and are still located, the names of all of which stations are given; that from February 10, 1910, to March 25, 1910, its said special rates on distillers' supplies were applied on *intrastate traffic* to all of said forty-eight stations; and that since March 25, 1910, its *present rates*, as covered by tariffs on file with the State Commission and Interstate Commerce Commission, have been applied and are still in force from Louisville, Covington and Newport, Kentucky, to all of said forty-eight stations on such supplies, articles or commodities in quantities as set forth in said order.

Appellant there further alleges that the volume or movement in said supplies, articles and commodities from said cities on the Ohio river to the thirty-two stations at which distillery plants are located, *other* than the sixteen named in said order, has heretofore been and will continue to be at least three times as great as the volume or movement thereof from and through said Ohio river cities to the sixteen points covered by said order; and appellant's loss in revenue, if it is compelled to put in the rates prescribed by said order to said thirty-two stations from said cities in Kentucky will be at least three times as great as its loss in revenue will be on account of having to put in the reduced rates prescribed by said order from said Ohio river cities to the sixteen points named in said order, or will be a loss of at least $54,000 annually in its rates, intrastate and interstate, on such shipments to said thirty-two distillery stations, as compared with a loss of at least $18,600 on intrastate and interstate shipments to said sixteen distillery stations; and that these losses will be exclusive of those on shipments of like commodities to consignees *other* than distillers at said points, which if included, would make the total losses to appellant very much larger per annum.

Appellant also alleges that at least one-half of the volume or movement of such supplies, articles and commodities to said thirty-two distillery points has heretofore been and will continue to be in interstate commerce, entering the State of Kentucky at the Cincinnati and Louisville crossings of the Ohio river; and if appellant should be compelled to apply the rates prescribed by said order to such interstate shipments to said thirty-two distillery stations, its loss on its interstate revenues will be at least $27,000 annually, and its loss on its intrastate shipments to said thirty-two distillery stations will be as much as the last named amount annually.

It is our purpose to deal in this part of our brief with the foregoing averments only so far as they pertain to intrastate traffic, and to discuss the interstate commerce features further on.

In the concluding paragraph of the same pleading is the following averment (Tr. 120):

> The complainant further states that it cannot obey the provisions of said order with respect to the sixteen distillery stations alone out of the forty-eight distillery stations in all on its lines in Kentucky, without violating the provisions of Section 817, Kentucky Statutes, against unjust discrimination, and the provisions of 818, Kentucky Statutes, against making or giving undue or unreasonable preferences or advantages and against creating undue or unreasonable prejudice or disadvantage, and the necessary result of putting in the rates under the Commission's order would be to compel complainant to reduce the intrastate rates proportionately to each of said other thirty-two stations at which distilleries are located, or to violate the provisions of the Kentucky Statutes aforesaid.

It is difficult to explain and illustrate the unjust discriminations and undue preferences against other shippers and localities without a map before the court, showing the location of the sixteen distillery stations set out in the

order complained of, and the location of the other thirty-two distillery stations, on appellant's lines in Kentucky, but assuming this court may take judicial notice of the Railroad Map issued by the Commission of that State for 1910, we submit in the Appendix to this brief a diagram based on a section of that map, drawn on a smaller scale, on which will be found the names and locations of the Ohio River cities referred to, the several lines of appellant, the names and locations of said forty-eight distillery stations, the sixteen covered by the Commission's order being designated in black, and the other thirty-two in white circles. The distances from Louisville, Covington and Newport to these forty-eight distillery stations, respectively, are taken from statements Nos. 3 and 4, made exhibits with appellant's second amended bill (Tr. 120-121), and the tables embodied in the affidavits of Compton and Goodwyn. (Tr. 55; 63, 64.)

With this diagram or abbreviated map before the court we hope to be able to demonstrate the correctness of our claim that the Commission's rates are, on their face, unjust, unreasonable, unjustly discriminatory, and unduly or unreasonably preferential or prejudicial as between persons and localities.

Now, taking the Main Stem line, on this map, and going southward from Louisville, the court will observe a branch leading off from Bardstown Junction southeastwardly via Bardstown to Springfield, on which are the stations, whose names and locations are shown in black or white, being the distillery points to which the Commission's reduced rates do or do not apply, according to the color given; that is, black showing they do apply, and white showing they do not, and the distances from Louisville are also shown as follows:

Names	Color	Miles from Louisville
Chapeze	Black	24
Clermont	Black	25
Hobbs	Black	27
Lotus	White	29
Deatsville	Black	31
Samuels	Black	33
Hunters	White	36
Bourbon	White	37
Nazareth	White	37
Withrow	White	38
Bardstown	Black	39
Early Times	Black	42
Greenbrier	Black	45

Thus, on this branch there are 13 stations, to 8 of which the Commission's reduced rates apply, and to 5 of which they do not.

Then, the court will notice going further southward on appellant's Main Stem line, another branch which leads off from that line at Lebanon Junction and runs southeastwardly via Lebanon to Greensburg, and adopting the same method as above, we have the following results, to-wit:

Names	Color	Miles from Louisville
Athertonville	White	44
Gethsemane	Black	48
New Hope	White	50
Willow Springs	White	51
Coon Hollow	Black	52
Dants	Black	53
Chicago	Black	55
Loretto	Black	57
St. Marys	Black	62
Lebanon	Black	67
Calvary	White	73
Campbellsville	White	87

On this branch there are 12 stations in all, to 7 of which the Commission's reduced rates apply, and to 5 of which they do not.

Following the Lebanon Branch on southeastwardly to Rowland and thence eastwardly on that line toward Richmond, the following four stations at which distillery plants are located will be found, and adopting the same method as above, the following results are shown, to-wit:

Names	Color	Miles from Louisville
Haden	White	107
Gilbert	White	110
Lancaster	White	113
Silver Creek	Black	129

Thus, there are 4 stations in all on this branch line, to only 1 of which the Commission's reduced rates apply, and to 3 of which they do not.

Then, on the Knoxville Branch, running southeastwardly from Rowland, is found Crab Orchard, marked in white, which is 115 miles from Louisville, and at which is located a distillery plant to which the Commission's reduced rates do not apply.

Now, returning to the Main Stem line and going southwardly to a point a few miles below Bowling Green, we have a station called Memphis Junction, which is 118 miles from Louisville, at which station there is located a distillery plant to which the Commission's reduced rates do not apply.

About 15 miles northeast of Bardstown will be found, colored in white, the station of Bloomfield, which is the southern terminus of the Bloomfield Branch, 58 miles from Louisville, where there is a distillery plant located, to which the Commission's reduced rates do not apply.

Taking the Lexington Branch from Louisville running first northeastwardly to LaGrange and thence eastwardly we find, colored in black, Eminence, 40 miles from Louisville, at which a distillery plant is located, to which the Commission's reduced rates are made to apply, although it does not appear that there was any complaint by the

distillery corporation doing business at that point or any one else of the existing rates thereto, in the proceeding before the Commission, and *complainant had no notice in that proceeding that the Commission would consider the question of rates to that point* (Exhibit C, Petition, Exhibit A therewith, and Answer in the Proceeding before the Commission, Tr. 31-35).

Of course, the order of the Commission reducing appellant's rates to Eminence is utterly void, even under the provisions of the McChord Act, the Commission being without any jurisdiction whatever in the premises.

Following the Lexington Branch on eastwardly from Eminence to a point a few miles east of Frankfort, we find a station, colored white, called Jett, 71 miles from Louisville, at which there is a distillery plant, to which the Commission's reduced rates are not made applicable.

Further eastward on the same line, and a few miles west of Lexington, is found a station marked in white, called Silver Springs, 88 miles from Louisville, at which there is a distillery plant located, to which the Commission's reduced rates do not apply.

The court is now asked to turn its attention to the line known as the Kentucky Division, having its northern terminus at Cincinnati, crossing the Ohio river there, connecting with Covington and Newport, Kentucky, on the south side of that river, and running thence southwardly through Paris, Winchester, and Richmond. On this line, before reaching Paris, it will be seen on the map that there are 13 stations, colored in white, at which distillery plants are located, but to none of which do the Commission's reduced rates apply. These stations, in the order in which they are reached going southward, and stating the distances from Covington, are as follows:

Names	Miles from Covington
Falmouth	38
Levingood	43
Morgan	46
Boyd	50
Berry	52
Robinson	55
Garnett	58
Poindexter	60
Kellers	62
Cynthiana	64
Lair	68
Shawhan	71
Kiserton	73

Strange to say, not one of the distillery corporations doing business at these 13 stations, within such close proximity to Covington and Newport, united, so far as this record discloses, in the complaint of the Greenbrier Distillery Company and others before the Commission, or made any complaint against appellant's existing rates from those two cities or from Louisville to either of said 13 stations.

But it does appear that the distillery corporations doing business at 3 other stations situated far away from Covington and Newport, complained of appellant's existing rates from those two cities, and the Commission's reduced rates were made applicable to said 3 stations distant from said points of origin as follows (Exhibit A, Tr. 26-27; Table with order of Commission, Tr. 28):

Names	Miles from Covington
Bardstown via Louisville	151
Coon Hollow " "	164
Silver Creek " Richmond	127

In addition to what has been stated above on the subject of the unjust discriminations and undue preferences between persons and localities which would be brought about by the enforcement of the Commission's one-way

rates on distillers' supplies, as set out in the order complained of, we call the court's attention to the affidavit of Traffic Manager Compton (clauses 3, 4, 5—Tr. 52-56), and to the affidavit of General Freight Agent Goodwyn (clause 5—Tr. 64). This testimony and the statements of the bill as amended, verified by Third Vice President Smith, on the same subject, were uncontradicted on the hearing of appellant's motion for an interlocutory injunction.

It seems plain and indisputable, therefore, that it is impossible for appellant to put the Commission's rates into force and effect without contravening both the letter and spirit of Sections 817 and 818, Kentucky Statutes, and for that reason, if for no other, said rates are manifestly unjust and unreasonable, and should have been enjoined by the court below. It is doubtless true appellant, by obeying the Commission's order fixing these reduced rates, would not be *wilfully* violating said sections of the Kentucky Statutes, or subjecting itself to the penalties prescribed in Section 819, but it is nevertheless true that unjust discriminations and undue preferences as between persons and localities would inevitably result, in the same manner and to the same extent, between persons and localities as if said discriminatory and preferential rates had been established voluntarily by appellant. The beneficent object of the law embodied in these sections would be effectually defeated by the action of the Commission's own order, if allowed to become effective, unless appellant should, to its great financial loss, annually apply these reduced rates uniformly, according to distances, upon all shipments of like commodities from the Ohio river cities to the other 32 distillery stations on its lines in Kentucky, although the distillers at those points, so far as this record discloses, have not complained of appellant's present rates applied to such commodities.

We submit that the Commission has no statutory power or authority to place appellant in that attitude, and its attempt to do so should not be allowed by a court of equity to become successful.

It was claimed by appellee's counsel in the court below, by way of meeting the averment and proof that the rates prescribed by the Commission operate to discriminate against shippers and other localities in the State, that Section 818, Kentucky Statutes, which was asserted to be the only statute in Kentucky prohibiting discrimination as between *localities*, had been declared void as to the penalties, because of its uncertainty, in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491, and, therefore, complainant can safely await the further action of the Commission before it changes its other rates. Now, the section which prohibits unjust discrimination is Section 817, Kentucky Statutes, which has not been declared void in any case. Section 818 is framed against undue preferences, and Section 817 against unjust discriminations, and both are still in full force and effect, except as penal statutes. Certainly the Acts therein prohibited or declared to be unlawful, are against the public policy of the State, although not punishable as provided in Section 819. (99 Ky. 132.)

X.

THE RATE ORDER OF AUGUST 10, 1910, OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

Errors assigned as XV, XVI, and XVII, will be discussed under this heading.

The Facts Bearing Upon This Proposition.

The facts which bear upon the proposition that the order of August 10, 1910, of the Railroad Commission of Kentucky, as reasonably interpreted, directly and by its necessary operation interferes with and amounts to a burden upon interstate commerce and operates as a regulation of commerce among the States, which facts are established by the uncontradicted allegations of the verified pleadings of appellant and by the supporting affidavits of C. B. Compton and D. M. Goodwyn, or of which this court will take judicial notice, are briefly stated as follows:

1. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic.

2. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of

Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

3. The order of the State Railroad Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

1.

In support of the first statement of fact, that the order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force interfere with and reduce appellant's interstate rates and interstate revenues, it is alleged by appellant in Paragraph XII of the original bill of complaint (Tr. 20 and 21) that the reduction in its rates ordered by the Commission would, if put into effect, directly, and necessarily interfere with, affect, and reduce appellant's existing rates on the commodities affected by the order to and from stations on its lines in Kentucky from and to stations on its lines outside of Kentucky; and that the order of the Commission, were it to become effective, would not only reduce appellant's local rates in Kentucky and cause an annual loss to appellant of at least $15,600.00, but would directly and necessarily result in reducing appellant's through rates on interstate shipments of such freight and cause an annual loss to appellant thereon of not less than $3,000.00, and that the change in rates and charges directed by the Commission in its order aforesaid would necessarily result in the disturbance, alteration, and re-

duction of interstate rates then and for a long time established on appellant's lines.

It is further alleged by appellant in Paragraph XX of its first amended bill (Tr. 81 and 82) that the enforcement of said order would compel appellant to accept upon interstate as well as upon intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which would not yield to appellant a fair or reasonable compensation for the service performed, and that the enforcement of the rates prescribed by said order would inflict upon appellant a direct annual loss of revenue and income to at least the extent of the sums stated in its original bill of complaint upon the transportation of both intrastate and interstate traffic in Kentucky, and a loss many times larger as the necessary result and consequence of putting into force and effect the rates in accordance with said order between the points named therein and between other points on its lines in Kentucky.

And in its second amended bill filed of record January 12, 1911, (Tr. 113) after setting forth certain rules and regulations of the Interstate Commerce Commission affecting the construction, filing and use of freight tariffs and classifications, appellant states (Tr. 118) the facts as to the application of its special rates on distillers' supplies to the 48 distillery stations at interior points in Kentucky prior to March 25, 1910, on both interstate and intrastate traffic, and the restoration of its standard rates thereon since that date as heretofore set out in this brief. It is further alleged a loss of $54,000 annually would be sustained by appellant, if compelled to apply the Commission's rates to the same commodities moving in both interstate and intrastate commerce to the forty-eight distillery stations in Kentucky.

It is a matter of universal knowledge in accordance with which all men conduct their daily affairs and regulate their lives that mankind will not pay more for a given service than it is required to pay. As set forth in the first amended bill in this case, (Tr. 115), the Interstate Commerce Commission considers a through rate or fare which is higher than the sum of the locals between the same points as prima facie unreasonable. The same principle is recognized by Congress in the fourth section of the Act to regulate commerce as amended June 18, 1910. As was said by Judge Trieber in the Arkansas Rate Cases, 187 Fed. 296, "if the States of Arkansas, Texas, and Missouri each enact a two cent rate fare, it would be folly for a carrier to attempt to charge a higher rate for interstate or transstate passengers in those States, for passengers would purchase tickets to the State line of each State at the reduced local rates and thus defeat the higher interstate rates, although the State rates are by the statutes of these States limited to intrastate transportation solely"; and, as indicated by Judge Trieber, the same rule applies to reshipments of freight. This Court has said (*Western Union Telegraph Co.* v *Kansas*, 216 U. S. 37):

> We cannot fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.

The court below (Tr. 105) correctly inferred that with the reduction of the intrastate rate from Covington to Bardstown to $24.00 per car and the continuance of the present interstate rate from Cincinnati of $38.40 per car and the existence of a fair and reasonable charge for transporting the car from Cincinnati to Covington of, for ex-

ample, $5.00, all through shipments of cars from Cincinnati would cease unless the through rates were reduced to the combination which could be made with the intrastate rate from Covington. And this court will judicially notice that if the order of the Commission reducing appellant's intrastate rates were put in effect and appellant committed the folly of endeavoring to maintain its interstate rates from Cincinnati and other points outside of the State of Kentucky at amounts in excess of the combinations which could be made on intrastate rates from Covington and other points affected by the Commission's order, appellant's revenues on interstate traffic would, *nevertheless*, be reduced in consequence of the reshipping which would be practiced at Covington, Newport, and Louisville, and that, therefore, regardless of any action which appellant might take, the direct and necessary result of the enforcement of the order of the State Railroad Commission would be the curtailment or destruction of appellant's interstate traffic in the commodities affected, and the extinguishment or reduction of its interstate revenues with respect to such traffic.

2.

In support of the second statement of fact, that the order of the Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and commerce of other States, it was alleged by appellant in Paragraph XX of its first amended bill (Tr. 82) that the enforcement of said order would compel appellant to charge and receive a less rate or compensation for the transportation of like kind of traffic in both intrastate and interstate, for a longer haul than for a shorter haul over

the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States against such discrimination.

And in its second amended bill filed January 12, 1911, (Tr. 113) after setting forth the provisions of Sections 2, 3, 4 and 6 of the Act to regulate commerce as amended, and certain rules and regulations of the Interstate Commerce Commission affecting the construction, filing, and use of freight tariffs and classifications, appellant averred (Tr. 116-118) that the City of Cincinnati, is situated on the north side of the Ohio river, which forms the State line between Ohio and Kentucky, and that appellant's rates from said city situated on the north side of said river, at the crossing thereof, to interior points in Kentucky were and had always been the same as or no higher than the rates from Covington or Newport, immediately opposite Cincinnati, on the south side of the Ohio river, to the same interior points in Kentucky on the same kinds of freight or commodities carried in the same quantities and under the same conditions; and that no difference was or had been made between the interstate rates and the intrastate rates of appellant from Cincinnati or from Covington or Newport to interior points in the State of Kentucky. And it averred that the immediate result of permitting the order of the Railroad Commission of Kentucky to go into effect would be an unjust discrimination against Cincinnati and all dealers in grain and other commodities used in the manufacture and shipment of whiskey located and doing business in that City, and they would thereby be subjected at once to an undue and unreasonable prejudice and disadvantage, and would have to pay the existing interstate rates on said commodities as set out in appellant's tariffs published and on file with the Interstate Commerce Commission; whereas like dealers doing busi-

ness just across the Ohio river, or State line, in Covington or Newport, Kentucky, under substantially similar circumstances and conditions, could and would ship the same commodities in the same quantities to the same interior distillery points in Kentucky on appellant's lines at the materially lower rates prescribed in said order, and would, therefore, receive an undue and unreasonable preference and advantage. Appellant averred that there existed no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order originating at Covington or Newport were or would be entitled to be transported to said distillery points at less rates than were in force on interstate shipments coming from without the State of Kentucky or from Cincinnati. And appellant further averred that what was true in this respect at the Cincinnati crossing of the Ohio river was likewise true in this respect at the Louisville crossing of the river.

With its said second amended bill, and as a part thereof, appellant filed a table marked "Statement No. 1," which was compiled from the existing official tariffs of appellant on file with the Railroad Commission of Kentucky and the Interstate Commerce Commission, and which illustrated what was stated with respect to appellant's rates applicable to interstate and intrastate shipments from the Cincinnati crossing of the Ohio river as compared with the Commission's rates from Covington and Newport, to the three interior points in Kentucky named in the order of August 10, 1910, on grain and other articles and commodities shipped in quantities as set out in said order, and which showed certain discriminations created by said order in favor of intrastate traffic and against interstate traffic passing through the Covington or Newport gateway or via the Cincinnati crossing of the river. That statement showed, for example, the following discriminations, for

which no reason existed, created by the order of the State Railroad Commission in favor of intrastate traffic from Covington and Newport, Kentucky, and against interstate traffic from the same points:

On barrel and box material, K. D., L. C. L., per 100 lbs., the rate to Bardstown, Kentucky, on interstate and intrastate traffic is 28 cents; the rate ordered by the State Commission on intrastate traffic is 23 cents, a discrimination, without reason, against the interstate traffic and in favor of the intrastate traffic of 5 cents per 100 lbs. The discrimination, without reason, on similar traffic to Coon Hollow, in favor of intrastate traffic and against interstate traffic, is 13.5 cents per 100 lbs. The existing rates from Covington and Newport, applicable alike on intrastate traffic and on interstate traffic on empty barrels, C. L., to Bardstown and Coon Hollow, were 16.8 cents and 20.4 cents per barrel, respectively; the rate ordered by the State Commission applicable on intrastate traffic is 14 cents per barrel in each case, resulting in a discrimination, without reason, in favor of intrastate traffic and against interstate traffic of 2.8 cents per barrel in the case of shipments to Bardstown, and of 6.4 cents per barrel in the case of shipments to Coon Hollow. And there is shown a further discrimination resulting from the fact that the existing C. L. rates on empty barrels applying alike to intrastate traffic and to interstate traffic are available only for shipments of a minimum weight of 10,000 lbs., or 166 2-3 barrels, while the rates ordered for intrastate traffic by the Commission are available for a minimum of 120 barrels. And similar discriminations, without reason or justification, in favor of intrastate traffic and against interstate traffic, from the same points, Covington and Newport, in connection with shipments to Bardstown, Coon Hollow and Silver Creek, are shown as follows: bottle caps, metal, any quantity, per 100 lbs., to Coon Hollow, interstate rate 50

cents; intrastate rate 37.5 cents; discrimination in favor of intrastate traffic and against interstate traffic 12.5 cents, or 25 per cent as measured by the interstate rate, or 33 1-3 per cent as measured by the intrastate rate. Bottle covers, paper or straw, packed or pressed in bales, C. L., per 100 lbs., to Bardstown, interstate 28 cents; intrastate 23 cents; amount of discrimination 5 cents per 100 lbs.: to Coon Hollow, interstate 34 cents; intrastate 20.5 cents; amount of discrimination 13.5 cents; and there is the further discrimination caused by the fact that in interstate traffic, in order to secure the C. L. rates, there must be a shipment of the minimum weight of 24,000 lbs., while on intrastate traffic, under the order of the Commission, C. L. rates are available for a shipment of the minimum weight of 15,000 lbs. On bottle covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs., the interstate rate to Bardstown is 32 cents; the intrastate rate prescribed by the State Commission, 29 cents, the unjust discrimination being 3 cents per 100 lbs.; and on shipments to Coon Hollow the rate on interstate traffic is 38 cents; the rate prescribed by the State Commission, 33 cents; and the discrimination 5 cents per 100 lbs. On bottles, common, packed, released, C. L., per 100 lbs., the interstate rates to Bardstown and Coon Hollow are 30 cents and 36 cents respectively; and the intrastate rates sought to be applied by the Commission, 25 cents and 23.5 cents, respectively, resulting in a discrimination of 5 cents per 100 lbs. and 12.5 cents per 100 lbs., respectively, in favor of intrastate traffic and against interstate traffic. On bottles, common, packed, released, L. C. L., per 100 lbs., the unjust and unreasonable discriminations per 100 lbs. in favor of intrastate traffic and against interstate traffic sought to be affected by the State Commission are, on shipments to Bardstown, Coon Hollow, and Silver Creek, 6.5 cents, 13.5 cents, and 6 cents. On shipment of boxes, empty, any quantity, per 100

lbs., the discriminations in favor of intrastate traffic and against interstate traffic amount, in some cases, to more than 100 per cent of the intrastate rates, the L. C. L. rates for interstate traffic to Bardstown, Coon Hollow, and Silver Creek, per 100 lbs., being, respectively, 49 cents, 57 cents, and 40 cents; and the rates sought to be made effective by the Commission being, respectively, 28 cents, 21.5 cents, and 19 cents; and the discriminations per 100 lbs. amounting, respectively, to 21 cents, 35.5 cents, and 21 cents. On shipments of corn, rye, malt, or barley, C. L., the rates applying on interstate traffic are 16 cents to Bardstown, 18 cents to Coon Hollow, and 13 cents to Silver Creek; the rates sought to be made effective by the Commission on intrastate traffic are 10 cents, 11 cents, and 10 cents, respectively; a discrimination of, without reason, respectively, 6 cents, 7 cents, and 3 cents per 100 lbs. On shipments of iron, hoop, C. L., to Coon Hollow, the rate applicable to interstate shipments is 29 cents per 100 lbs.; the rate sought to be applied by the State Commission on intrastate shipments is 17 cents per 100 lbs., an unjust and unreasonable discrimination of 12 cents per 100 lbs. And by the same statement unjust and unreasonable discriminations in favor of intrastate traffic from Covington and Newport, and against interstate traffic from Cincinnati, Ohio, (the rates from which Ohio point have always been made the same as or less than the rates from Covington and Newport, Kentucky) are shown as follows: On barrel material, K. D., L. C. L., per 100 lbs., to Coon Hollow, 9.5 cents; on barrels, empty, C. L., 4 cents per 100 lbs., with an advantage of a minimum of 120 barrels for intrastate traffic as against a minimum of 10,000 lbs., or 166 2-3 barrels, for interstate traffic; on bottle caps metal, any quantity, per 100 lbs., to Coon Hollow 8.5 cents; on bottle covers, paper or straw, packed or

pressed in bales, C. L., to Coon Hollow 9.5 cents per 100 lbs., with the further advantage in the application of intrastate rates on a minimum C. L. of 15,000 lbs., while C. L. rates cannot be secured on interstate traffic on a weight of less than 24,000 lbs.; on bottle covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs., to Coon Hollow 3 cents; on bottles, common, packed, released, C. L., to Coon Hollow per 100 lbs., 8.5 cents; on bottles, common, packed, released, L. C. L., per 100 lbs., to Bardstown, 4.5 cents; to Coon Hollow 14.5 cents; to Silver Creek 6 cents; on boxes, empty, L. C. L., to Bardstown 21 cents per 100 lbs.; to Coon Hollow 31.5 cents per 100 lbs., to Silver Creek 21 cents per 100 lbs; on corn, rye, malt, or barley, C. L., per 100 lbs., to Bardstown 6 cents; to Coon Hollow 7 cents; to Silver Creek 3 cents. On iron, hoop, C. L., minimum 24,000 lbs., per 100 lbs., to Coon Hollow 12 cents. And it is apparent to any one that interstate shippers through Covington or Newport, or shippers from Cincinnati, could not, with the great discriminations in rates indicated (amounting, in some cases, to more than 100 per cent of the intrastate rates), hope to do business under the interstate rates in competition with the shippers who obtain the benefit of such intrastate rates from Covington and Newport.

With its said second amended bill, and as a part thereof, appellant also filed (Tr. 117) a table marked "Statement No. 2," compiled from the same sources, which showed appellant's rates on the same articles and commodities shipped in quantities set out in the Commission's order applicable to interstate and intrastate shipments from the Louisville crossing of the Ohio river as compared with the Commission's rates to the sixteen interior points in Kentucky named in said order, and which showed further discriminations created by said order in favor of intrastate traffic and against

interstate traffic. This statement shows discriminations in favor of intrastate traffic and against interstate traffic which would be caused by the enforcement of the order of the Commission with respect to shipments from Louisville, to the sundry distillery points named, varying from 1 cent per 100 lbs. to 30 cents per 100 lbs. For example, as shown by sheet number 3 of said table marked "Statement No. 2," the present rate on L. C. L. shipments of empty boxes applicable on both interstate traffic and intrastate traffic from Louisville to Lebanon, is 45 cents per 100 lbs.; the rate on empty boxes ordered by the Commission from Louisville, applicable on intrastate traffic is 15 cents per 100 lbs.; the resulting discrimination in favor of the intrastate traffic and against the interstate traffic is 30 cents per 100 lbs., or 200 per cent of the total rate sought to be enforced on intrastate traffic by the Commission. In other words, on the movement of this commodity from Louisville to Lebanon, the enforcement of the order of the Commission would create, without reason, such a discrimination against interstate traffic that the interstate shipper would have to pay three times as much as the intrastate shipper for the movement of the same quantity of a like kind of freight between the same points under the same circumstances and conditions.

With its said second amended bill, and as a part thereof, appellant also filed a table marked "Statement No. 3," compiled from the same sources, which shows appellant's rates from Cincinnati applicable on interstate traffic originating there, and also at points north of the Ohio river not on appellant's lines, as well as appellant's existing rates from Covington and Newport, applicable on intrastate traffic from the latter points proper, and also on interstate traffic originating at points north of the Ohio river not on appellant's lines, and the rates ordered by the Commission applicable on intrastate traffic from Covington

and Newport, all to certain distillery stations on appellant's lines in Kentucky, and appellant's existing rates to the same and to all other distillery stations on its lines in that State. This statement illustrates how the enforcement of the order of the Commission would necessarily cause discrimination against interstate traffic, either by reason of charging a greater compensation for the movement of that traffic than would be charged for the movement of intrastate traffic, under the same circumstances and conditions, or, if this were attempted to be avoided, by reducing the interstate rates to the level of the intrastate rates by charging on interstate traffic a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

For example, Gethsemane, New Hope, Willow Springs, and Coon Hollow, are stations situated upon the Lebanon Branch of appellant's line of railroad, respectively 156, 158, 159, and 160 miles from the river crossing at Cincinnati, Newport, and Covington. The shortest route from Cincinnati, Newport, and Covington to these stations is via Louisville, and Lebanon Junction, and via this route Gethsemane, New Hope, and Willow Springs are all intermediate to Coon Hollow; and property carried from Cincinnati, Covington, or Newport to Gethsemane, New Hope, or Willow Springs would be transported over the same line or route in the same direction for a shorter distance than property carried from the same points to Coon Hollow, and the shorter would be included within the longer distance. The rates on barrel and box material, K. D., L. C. L., per 100 lbs., applicable on both interstate traffic and on intrastate traffic from Covington and Newport, to these four stations are the same, 34 cents per 100 lbs., and the rates from

Cincinnati, on this commodity are 30 cents per 100 lbs. to Willow Springs and Coon Hollow, and 29 cents per 100 lbs. to the intermediate stations, Gethsemane and New Hope. The rate ordered by the Commission from Covington and Newport, Kentucky, applicable in intrastate traffic on box and barrel material, K. D., L. C. L., per 100 lbs., to Coon Hollow, is 20.5 cents. If the order of the Commission were put into effect, and the rate of 34 cents now applicable on this commodity on interstate traffic from Covington and Newport to Coon Hollow, is not reduced, there would necessarily result an unreasonable and unjust discrimination against the interstate traffic of 13.5 cents per 100 lbs.; and if the interstate rate from Covington and Newport, on this commodity to Coon Hollow were reduced to the rate ordered applicable on intrastate traffic by the Commission, 20.5 cents, there would result on interstate traffic to the intermediate points, Gethsemane, New Hope, and Willow Springs, a discrimination of 13.5 cents per 100 lbs., which is prohibited by Section 4 of the Act to regulate commerce as amended June 18, 1910. And in a similar way, either the rate of 30 cents from Cincinnati to Coon Hollow must remain, and, as compared with the intrastate rate of 20.5 cents from Covington and Newport, constitutes an unreasonable discrimination of 9.5 cents per 100 lbs. against interstate traffic, or, if the rate from Cincinnati is reduced to the level of the intrastate rate, there will result a discrimination prohibited by the long and short haul clause of the fourth section of the Act to regulate commerce as amended, amounting to 8.5 cents per 100 lbs. in the case of the intermediate points, Gethsemane and New Hope, and of 9.5 cents per 100 lbs. in the case of the intermediate point, Willow Springs. If it should be supposed that traffic from Covington, Newport, or Cincinnati might reach Coon Hollow, via Livingston or Rowland, junctions of a possible

line from Cincinnati with the Lebanon Branch, in an opposite direction from Lebanon Junction, such supposition would not change the results, because on traffic so moving Dants, Chicago and Loretto, would be stations on the Lebanon Branch intermediate between Cincinnati, Covington, and Newport on the one hand, and Coon Hollow on the other; and, as is shown by table marked "Statement No. 3," the unjust discriminations with respect to traffic to Dants, Chicago, and Loretto would be as great as or greater than the discriminations which have been illustrated with reference to Gethsemane, New Hope, and Willow Springs. Gilbert, which is shown in the list of distillery stations in table marked "Statement No. 3," is a station in Lincoln County, Kentucky, on the Richmond Branch of the Kentucky Division of appellant's line of railroad, and is not on the same branch as Withrow and Bardstown, stations which are shown contiguously in the list. Bloomfield is a station in Nelson County on the Bloomfield Branch of appellant's line, and Lancaster is a station in Garrard County on the Richmond Branch of the Kentucky Division of appellant's line. Chapeze, Clermont, Hobbs, Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon, Withrow, and Bardstown, are stations on the Bardstown Branch of appellant's line which can only be reached via Bardstown Junction; and on shipments from Cincinnati, Covington, or Newport, Chapeze, Clermont, Hobbs, Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon and Withrow are intermediate on the same line to Bardstown. As is shown on sheet 4 of table marked "Statement No. 3," the rates from Cincinnati, and from Covington and Newport, applicable alike on interstate traffic and on intrastate traffic on bottles, common, packed, released, L. C. L., are to Chapeze, Clermont and Hobbs, 34 cents per 100 lbs., and to Lotus, Deatsville, Samuels, Bloomfield, Hunters, Nazareth, Bour-

bon, Withrow and Bardstown, 37 cents per 100 lbs. The rate ordered by the Commission on this commodity from Covington and Newport, applicable on intrastate traffic to Bardstown is 31.5 cents per 100 lbs. In the explanation just given with respect to rates on box and barrel material to Coon Hollow, it is evident that if the order of the Commission is put into effect either the rates to Bardstown on interstate traffic must remain at the present figures, resulting in an unreasonable and unjust discrimination of 5.5 cents per 100 lbs. in favor of intrastate traffic and against interstate traffic, or, if the interstate rates to Bardstown are reduced to a level with the intrastate rates, such action will result in an unlawful discrimination of 2.5 cents per 100 lbs. against interstate shipments to Chapeze, Clermont, and Hobbs, and of 5.5 cents per 100 lbs. to Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon, and Withrow, in violation of the long and short haul clause of the fourth section of the Act to regulate commerce as amended by the Mann-Elkins Act of June 18, 1910.

Similar conditions with respect to traffic from Louisville, are shown by table marked "Statement No. 4," which was also filed (Tr. 117) as part of appellant's second amended bill.

The affidavit of C. B. Compton (Tr. 45) also shows that the order of the Commission reducing appellant's rates would, if put into effect, create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States; and as illustrative of some of the discriminations that would arise from the enforcement of said order, includes a statement (Tr. 55) showing certain rates on corn, rye, malt and barley from Louisville, which would have to be established,

both intrastate and interstate, to prevent unjust discriminations and violations of the long and short haul principle.

3.

In support of the third statement of fact, that the order of the Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States, it is averred by appellant in Paragraph XX of its first amended bill, filed November 3, 1910, (Tr. 80-82) that the maximum rates prescribed by the Commission in its order of August 10, 1910, herein complained of, upon corn, rye, malt, barley and other articles used in the manufacture and shipment of whiskey, on and over appellant's lines from Louisville, Covington, and Newport, respectively, to the sixteen stations, respectively, named and set out in the said order, are arbitrary, unjust, unreasonable, discriminatory, and illegal, because of, among other grounds, facts which were alleged to exist, as follows:

(a). The enforcement of the rates prescribed in said order would bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points in other States and transported between the same points in Kentucky, or it would result in the application of said reduced rates, without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.

(b). The said order, if enforced, would compel appellant to charge materially less rates in one direction than in the other direction between the same points on both intrastate and interstate traffic of the

same kind, or else to apply said specially low rates, without distinction or discrimination, in both directions between all points.

(c). The said order, if enforced, would require appellant to charge less rates upon corn, rye, malt and barley than upon wheat, oats, and other kinds of grain, whereas it has always endeavored to charge and collect the same rates upon all kinds of grain; or it would result that appellant would be compelled to apply the rates specified in said order to all kinds of grain upon both intrastate and interstate shipments.

(d). The said order, if enforced, would compel appellant to charge and collect less rates per 100 lbs. upon carload quantities than less than carload quantities of grain, whereas appellant has always endeavored to charge and collect the same rate upon carload as upon less than carload quantities of grain; or it would result in appellant being compelled to establish less rates for carloads than for less than carload quantities of grain upon both intrastate and interstate traffic.

And in its second amended bill (Tr. 119) it is further averred by appellant that a large volume of interstate traffic in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north and west of the Ohio river through Covington and Newport to the distillery stations named in the said order of August 10, 1910, as well as to the thirty-two other distillery stations on appellant's lines in Kentucky; and in each case the *through* rate charged and collected thereon from points north and west and beyond Cincinnati is and had been the same as the rate from those points of origin to the Ohio river, plus the rate south of the river. And it is further averred that the direct, immediate, and necessary operation and effect of the putting into force of the intrastate rates on the commodities prescribed in the order of August 10, 1910, would be to compel appellant, unless it surrendered its right to transact such interstate commerce business and to give it up entirely, to do one of two things, to-wit:

Either, on the one hand, to change and reduce its existing rates (which are just and reasonable and covered by its tariffs on file with the Interstate Commerce Commission) on interstate shipments of like commodities originating at Cincinnati and other points outside of Kentucky, north and west of the Ohio river, and entering that State at the Cincinnati or Louisville crossing of the Ohio river, destined to the points named in said order; or

On the other hand, to continue its said rates on interstate shipments in full force and effect, without change or reduction, leaving them materially and substantially higher on the same commodities shipped from Cincinnati and other points outside of Kentucky for the same distances in Kentucky, or on the south side of the Ohio river, to the same destinations named in said order, thus creating unjust discriminations against shippers of such traffic in interstate commerce by charging, demanding, collecting, and receiving from them a greater compensation for the services rendered in the transportation of property than it charges, demands, collects, or receives from other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, as well as giving undue and unreasonable preferences or advantages to the shippers of such traffic in intrastate commerce in Kentucky, and subjecting shippers of the same class of traffic to the same destinations from Cincinnati and localities north and west of the Ohio river and other points outside of the State of Kentucky, to undue and unreasonable prejudice and disadvantage in said respects.

And in either event, as has been stated, and as is fully apparent, the revenues of appellant would annually be diminished to a large extent. And appellant, in said second amended bill, further averred that the said order of August 10, 1910, was illegal and void because it thus substantially interfered with, burdened, and regulated interstate commerce, and hampered the enforcement of the Act to regulate commerce, and compelled appellant to abandon or surrender the rights which

it had, under the Constitution and laws of the United States, and would prevent it from enjoying its rights and powers under said Constitution and laws in the transportation of interstate traffic.

THE OPINION OF THE LOWER COURT.

The Circuit Court in its statement of inferred facts (Tr. 105) considers only that phase of the question which relates to reductions of interstate rates caused by combination with reduced intrastate rates, and, with respect to this aspect, holds that the election of the company to change the rates forced by commercial necessity is an independent intervening cause, and the effect is the indirect and not the direct result of a due exercise of the universally recognized police power residing in the State to reduce its intrastate rates.

The lower Court does not consider the question of discrimination against interstate traffic which is raised in the pleadings, except to remark that the railroad company will not be held responsible for such discrimination. The question as to whether or not the Interstate Commerce Commission will hold the railroad company responsible for such discrimination is entirely beside the point. The discrimination which the enforcement of the order of the State Commission would necessarily cause against interstate traffic and against the persons engaged in interstate traffic as compared with the persons engaged in intrastate traffic is in itself an interference with interstate commerce, regardless of the question as to whether the Interstate Commerce Commission will hold the carrier responsible for the creation of conditions admittedly beyond its control.

The Circuit Court said (Tr. 106) that if it could be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce, it needs no argument to show that

such enforcement would be violative of the Federal commerce clause, but

> 1. That the averments in this behalf of the bill as amended are made up rather of conclusions of counsel than of definite statements of fact; and
> 2. That there exists an election on the part of the company to change or not to change the interstate rates, which constitutes an independent intervening cause and renders the change an indirect and not a direct result of the Commission's order.

We submit that the Court below erred with respect to both of these points. In the case of Southern Railway v. King, referred to in the opinion, it was said by this Court (p. 533), after citation of numerous cases, that "applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their *effect* upon interstate commerce" and in passing upon the sufficiency of the averment of facts which has been made by the plaintiff in error, this Court said (p. 536):

> The Circuit Court of Appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful

operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense and that the demurrer thereto was properly sustained.

Mr. Justice Holmes, with whom Mr. Justice White concurred, vigorously dissented, and said (pp. 537-538):

The petitioner set up as a defense to these actions that the statute under which it was sued was such a burden on commerce among the States as to violate Sec. 8, Art. 1, of the Constitution of the United States—a pure issue of law. If in order to try this issue intelligently it was necessary to take evidence of facts, I think the Court was bound to hear such evidence, even without any specific allegation of the facts that would maintain it, as it is the Court's duty to know and to declare the law. But I leave that question on one side because the petitioners did not stop with the naked proposition, but alleged further that "it is impossible to observe said statute and carry the mails as the defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute." These are pure allegations of fact. They mean on their face that the requirements that the engineer at every grade crossing should have his train under such control as to be able to stop if necessary to avoid running down a man or wagon crossing the track requires such delays as to prevent or seriously to interfere with commerce among the States. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement imprac-

ticable, since I can think of nothing but the number of them that would have that effect.

The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required.

But even if the averments made by the Southern Railway Company in that case were not sufficient, it is plain that the averments made by appellant in this case cover all of the points which it was suggested by the majority of the court in the King case should have been set forth. In the King case it was complained that the averments did not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. In this case, as has been fully set forth in the discussion of the statements of fact, appellant showed the effect of the Commission's order as to traffic from all of the forwarding stations covered by the order, Louisville, Covington, and Newport, and as to all of the sixteen points of destination covered by the order, and showed, as well, the effect as to Cincinnati and other points outside of the State of Kentucky as compared with Louisville, Covington, and Newport, and besides showed the effect on shipments to thirty-two other distillery stations in Kentucky not included in the order of the Commission; and appellant further showed the minimum effect in dollars and cents on its revenues and traffic, interstate and intrastate separately, and comparisons were made and facts stated as to business of the sixteen distillery stations covered by the Commission's order and business

of the thirty-two distillery stations not covered by the order. In the former case it was said by the court:

> For aught that appears as allegations of fact in this answer, the crossings at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway.

In Paragraph XX of its first amended bill appellant set forth that the enforcement of the State Commission's order would compel appellant to charge and receive a less rate or compensation for the transportation of like kind in both interstate and intrastate traffic for a longer haul than for a shorter haul over the same line in the same direction, and tables included in the pleadings and in the affidavits of C. B. Compton and D. M. Goodwyn showed the details and particulars of this discrimination.

In its second amended bill (filed, as heretofore shown, at the suggestion of the court below after rendition of its opinion), appellant averred that there existed no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order originating at Covington or Newport were or would be entitled to be transported to said distillery points at less rates than were in force and covered on interstate shipments coming from without the State of Kentucky or from Cincinnati; and appellant further averred that what was true in this respect at the Cincinnati crossing of the Ohio river was likewise true in this respect at the Louisville crossing of the river. And appellant filed as part of its second amended bill tables marked "Statement No. 1," "Statement No. 2," "Statement No. 3," and "Statement No. 4," which set out not only the facts averred, but evidence of the facts.

In *Gates* v. *Haw*, 150 Ind. 370, citing Webster, a fact is defined as an effect produced or achieved. It is elementary that there are two kinds or classes of facts—evidentiary facts, and ultimate, main, or principal facts. Good pleading demands a statement of ultimate facts only, but it is submitted that in this case appellant has not only pleaded such facts, but has also given evidence of those facts. The facts necessary to be averred in this case in order to show that the effect of the order of the State Commission, if enforced, would be unlawfully to regulate interstate commerce have been properly averred, and they have further been proved conclusively by the testimony of experts, C. B. Compton and D. M. Goodwyn, which is uncontradicted in the pleadings or in the proof; and this court has held (*C. M. & St. P.* v. *Tompkins*, 176 U. S. 167, 178) that in such matters the testimony of experts is not to be disregarded.

The reasoning of the court below with reference to the election supposed to exist on the part of the company to change or not to change the interstate rates is unsound, for it suggests a dilemma either horn of which would result in an interference with interstate commerce. If the company yields to the inexorable law of trade and reduces its interstate rates, interstate commerce is subjected to interference and restraint by the reduction of interstate rates and by the loss of company's revenue on interstate commerce. If the company does not yield to the inexorable law of trade, interstate commerce is interfered with and restrained because it is discriminated against by lower rates on State commerce moving under substantially similar circumstances and conditions, and because the business will not move as interstate commerce when lower rates can be obtained by re-shipping at the river crossing, and moving it from the State line as

intrastate traffic, and interstate commerce is therefore destroyed.

The fact should be readily apparent even to a layman that the public will not ship at a higher rate in interstate commerce when it can secure lower through rates by reshipping at a reduced intrastate rate. But even if this compulsive necessity for reducing interstate rates to a parity with intrastate rates were not otherwise fully apparent, it is directly testified to by the experts Compton and Goodwyn in their affidavits.

Furthermore, as is shown by the pleadings, the Interstate Commerce Commission has said that a through rate in excess of the combination of locals is unreasonable, and it is apparent that such higher through rate on interstate traffic would be reduced as a matter of law on complaint of an interstate shipper to the Interstate Commerce Commission. The Interstate Commerce Commission has heretofore hesitated to take action in cases of discrimination where the reduced rates were forced upon the carriers by State authority, although holding the discrimination to exist (*Saunders* v. *Southern Express Company*, 18 I. C. C. 415). But the Interstate Commerce Commission has recently ruled that it will not, with respect to passenger rates, grant relief beyond May, 1912, from the prohibition of the fourth section of the Act to Regulate Commerce against through rates in excess of intermediate rates where the intermediate rates have been reduced by State action. Reference in this connection is made to various orders of the Interstate Commerce Commission issued under the fourth section of the Act to Regulate Commerce as amended June 18, 1910, particularly to Fourth Section, Order No. 89, with reference to the ticket rates of the Louisville & Nashville Railroad Company.

The Circuit Court held that there is no showing that the reduced rates prescribed by the Commission are con-

fiscatory, and its order is based upon the finding that the rates are not confiscatory. Assuming, for the sake of argument, that the finding of the court in this respect is correct, then on the movement of interstate freight under the rates prescribed in the Commission's order there would be some profit, even if that profit is not adequate, and the loss of the entire interstate business would, therefore, amount to more than the loss caused by a reduction of interstate rates to a parity with the reduced intrastate rates. In other words, the loss of the entire business will be greater than the loss caused by the reduction in rates. And, therefore, the carrier must either reduce its interstate rates to the level of the intrastate rates, or it must forego entirely the interstate business and suffer even greater loss. Clearly, there is no election such as suggested by the court. Surely such conditions are compulsive, and there is no escaping the conclusion that the direct and necessary effect of the order of the Commission is to interfere with, burden, and regulate interstate commerce.

Under the natural laws of trade, the State of Kentucky might just as well lay a tax on every car of traffic from Cincinnati or Jeffersonville, or other points outside of the State of Kentucky, destined to the Kentucky points named in the Commission's order (as the State of New York, before the adoption of the Constitution, levied a tax on shallops carrying vegetables and fruits from New Jersey, and wood boats bringing firewood from Connecticut) as to reduce intrastate rates so intimately connected with interstate rates as those in the present case.

It is impossible to conceive how the court in pursuance of any legal principles has arrived at the conclusion that even the voluntary (if it were voluntary) act of the carrier in choosing what appears to it the lesser of two evils could constitute an independent intervening cause. As

shown in Words and Phrases Judicially Defined, Volume No. 4, with reference to the definition of "intervening agency," and upon the strength of authorities there cited, intervening agencies, in order to interrupt the current of responsible connection, must entirely supersede the original culpable act and be in themselves responsible for the injuries, and must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. The principle is clearly stated by Melville M. Bigelow, in Paragraph 98, seventh edition, of his work on Torts, in discussing the maxim "*causa proxima, non remota, spectatur.*" With citation to the famous Squib case, *Scott* v. *Shepherd*, 2 W. Black. 892, Mr. Bigelow says:

> With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the 'remote' and disregards the proximate cause, as it does the contrary. A tosses a lighted squib into one of the booths of a market, and B, the owner of the booth, instinctively throws it out and it falls into the booth of C, who repeats the instinctive act, but now the squib strikes D in the face and puts out his eye. C obviously is nearest, or 'proximate' in the primary sense, to D, and A is most 'remote' of all; and yet A is liable to D, and C probably is not; A is liable whether C is or is not, supposing that C has acted instinctively and not of purpose, negligence, or other wrongful conduct towards D. It is obvious that the maxim is to be taken in some metaphysical sense; B and C must be regarded as machines, and the final result as happening in the natural course of things.

A similar situation arises in those cases wherein a person injured by another places himself in the care of a physician and does not recover from the injury, or the effects of the injury are greater because of a mistake of the physician. In such cases, of course the mistake of the physician is not considered as the primary, proximate, or direct cause of the injury. If the traffic manager, the

business physician of the railroad company, advises that the interstate rates must be cut to the level of the reduced intrastate rates in order to save what remains of the possibilities of interstate traffic, the railroad company would take his advice, just as the patient injured by another takes the advice of his physician. If the person injured by the wrongful act of another does not consult a physician, he suffers damage from the wrongful act; and if he does consult a physician, and the physician is unable to cure, or even intensifies the damage, the damage done is that effected by the original wrongdoer. The original wrongdoer in this case is the Railroad Commission of the State of Kentucky; and damage is sought to be done by that Commission to appellant by a wrongful act, which is in violation of the commerce clause of the Constitution of the United States.

There is no magic in the words "police power" used by the court below in its opinion (Tr. 106). The police power of a State is nothing more than the power of the State, the power of sovereignty, the power to govern men. If a State is forbidden by the Constitution to govern, or to legislate, or to regulate as to certain matters, it cannot so govern, legislate, or regulate by claiming that its action is an exercise of "the universally recognized police power residing in the State."

The prohibition against State interference with interstate commerce is found in the Constitution of the United States, and not merely in the enactment of the Act to Regulate Commerce; and the interference with interstate commerce caused by the Commission's order in this case exists regardless of the question as to whether or not, under the Act to Regulate Commerce, the Interstate Commerce Commission would hold a carrier responsible for the discrimination against and interference with interstate commerce caused by the order of the State Commission. In the *Saunders Fish Case*, 18 I. C. R. 415, referred to in

the opinion, the Commission suggested the necessity for Congressional control of rates exacted on State traffic by interstate carriers, but refrained from a regulation of such rates simply because the act under which it (the Commission) received its authority expressly excluded intrastate traffic from its jurisdiction. The commerce clause of the Constitution of the United States is not subject to such limitations.

With reference to the *Hope Cotton Oil case*, 12 I. C. R. 265, cited in the opinion of the court below, it is to be noted that, although the Interstate Commerce Commission may not have regarded the State rate as binding as a necessary measure of the interstate rate, they nevertheless did, in the *Hope Cotton Oil case*, base the interstate rate on the intrastate rate; and since that case was decided Congress has affirmatively provided in the fourth section of the Act to Regulate Commerce as amended that it shall be unlawful to charge any greater compensation on a through route than the aggregate of intermediate rates subject to the provisions of the Act.

The Circuit Court misconceives the proposition as to discrimination. That proposition is not that the railroad company would be punished for discrimination which it is forced by the order of the State Commission to inflict, but the proposition is that the order of the State Commission, if enforced, would itself, and by its necessary operation, constitute a discrimination against, and therefore a burden upon and interference with, and a regulation of interstate commerce. Sections 817 and 818 of the Kentucky Statutes (Tr. 120) and Sections 2, 3 and 4 of the Act to Regulate Commerce all provide against unjust discrimination, against the making or giving of undue or unreasonable preferences or advantages, and against creating undue or unreasonable prejudice or disadvantage. It will not be denied that the statutes of the State act

upon and prevent such discriminations between State rates, and it will not be denied that Sections 2, 3 and 4 of the Act to Regulate Commerce act upon and prevent such discriminations in interstate rates. But it is said by the court that it is provided in the Act to Regulate Commerce that the Act shall not apply to the transportation of passengers or property wholly within any State and not shipped to or from a foreign country from or to any State of territory. Can it be conceived that there is no power to prevent discrimination by an interstate rate against an intrastate rate, or discrimination by an intrastate rate against an interstate rate? The reasoning of the court below would lead to this conclusion. The State could not adjust such discrimination because it would amount to a regulation of interstate commerce, and the Nation could not adjust such discrimination because, indeed, a proviso of the Act to Regulate Commerce excludes from the operation of that Act the receiving, delivering, storage, and handling of property wholly within one State and not shipped to or from a foreign country from or to any State or territory. Such a result would be intolerable, and the fallacy is of course due to the measurement of the power of the Nation by the act of Congress instead of by the Constitution of the United States. The power granted by the commerce clause is ample, and in accordance with that clause the Nation, and the Nation alone, can prevent discriminations between interstate rates and intrastate rates. This court has held in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 101:

> There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of such law enacted by Congress separate and distinct from the body of such law enacted by the several States. But it is an entirely different thing to hold that there

> is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

And in the opinion of this court in that case, at page 100, it was reiterated that "this court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States; it has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free." It is clear that that common law which is enforced generally throughout the United States, and which governs the countless multitude of commercial transactions "among" the States, forbids discrimination either between interstate rates or between intrastate rates and interstate rates. It is clear that the power to prevent such discrimination resides to its full extent in the national authority, and is given to the Nation by the commerce clause of the Federal Constitution. And it is likewise clear that any discrimination in violation of that body of common law caused by the act of a State Railroad Commission is an interference with, and burden upon, and amounts to a regulation of, commerce "among" the States, and is unconstitutional and void.

The lower court's recital (Tr. 107) of what is claimed, falls far short of the complete statement of our case in this regard, as we shall hereinafter show in a re-statement of our proposition.

The lower court holds that the averments, that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. It is respectfully submitted that in this statement the lower court erred if, by a reference to changes for strictly business reasons, it meant that the interstate rates would be

reduced as an entirely voluntary act of the carrier. If by strictly business reasons, the lower court referred to the reasons *necessitating* the reduction of rates, it seems that it makes no difference how you denominate the reasons, provided those reasons are potent and compulsory. The question is not whether a business or economic *policy* of a railroad, as distinguished from a legal duty, to change its existing rates to correspond with just and reasonable rates imposed by the State body, is said to be a direct and not merely an indirect effect of the State's action. The interstate rates would be changed by the railroad company, not as a matter of *policy*, but as a matter of *necessity*. "In determining whether a statute does or does not burden interstate commerce, the court will look beyond mere form and consider the substance of things," *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 2.

In the same case this court said:

> But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show.

(Ib. p. 27.)

We cannot fail to recognize the intimate connection which, at this day, exists between the interstate

> business done by interstate companies and the local business which, for the convenience of the people must be done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the supreme law of the land.
>
> (Ib. p. 37.)

We submit that it is a mistake to say, as stated in the opinion of the lower court, the logic of the company's argument would release its local rates from governmental regulation altogether by reason of the fact that the United States could not fix local rates, because they are local, and the State could not change them, because it would thereby cast a direct burden on interstate commerce. It seems that the confusion of the lower court in this regard results from its lack of accurate definition or delimitation of the respective spheres of Congress and the States in the matter of commerce. Throughout its opinion the lower court has assumed the authority of Congress to be exclusive over interstate traffic, and over interstate traffic only; and has assumed the authority of the State to be exclusive over intrastate traffic. This assumption is entirely erroneous. Profitable argumentation of the question demands a more accurate definition of the general principles governing the spheres of influence or powers which we are discussing, and that accurate definition can readily be obtained from decisions of the courts in cases in which the precise question has been raised.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheaton 1, which is referred to in the opinion of the lower court (Tr. 108), it is to be noted that Chief Justice Marshall did not limit the power of Congress to the regulation of interstate rates and did not assert that the State had exclusive power over intrastate traffic; but what the great Chief Justice did say was (p. 194):

> The word "among" means intermingled with; a thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is *completely internal*, which is carried on between man and man in a State or between different parts of the same State, *and which does not extend to or affect other States.* * * * * Comprehensive as the word "among" is, it may very properly be restricted to that commerce *which concerns more States* than one. (Italics are ours.)

The commerce reserved to the States (9 Wheaton 195), is only that completely internal commerce which does not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. Chief Justice Marshall further said in that case, (p. 196):

> The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. * * * * We are now arrived at the inquiry—What is this power? It is the power to regulate, that is to prescribe, the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Chief Justice Marshall said that the power was the power to prescribe the rule by which *commerce*, not interstate commerce, is to be governed; that the power is com-

plete in itself, and may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.

There is no dispute as to the exclusive control of Congress over interstate commerce.

The definition of the respective powers of State and Nation, with respect to intrastate commerce, is most clearly given in the recent case of *Shepard* v. *Northern Pacific Railway Company*, 184 Fed. 765, in which Judge Sanborn said (page 770):

> To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce, the Nation, by its Congress and its courts, may affect and regulate intrastate commerce, but no farther.
>
> To the extent that it does not substantially burden or regulate interstate commerce, a State may regulate the intrastate commerce within its borders, but no farther.

It may be freely granted that the regulation of the completely internal commerce of a State is reserved to that State, but it must be as freely recognized that the completely internal commerce of the State is only that which does not extend to or *affect* other States, and as was further said by Judge Sanborn, (184 Fed. at page 770), upon the authority of numerous cases cited by him:

> If the plenary power of the Nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way because the Constitution and the Acts of Congress passed in pursuance thereof are the supreme law of the land, and that which is not supreme must yield to that which is supreme.

It is clear, therefore, that the logic of the company's argument would not release local rates from governmental regulation altogether.

We have shown above, in the discussion of the question of discrimination, that the unavoidable result of the reasoning of the lower court would be to release from governmental control all unjust and unreasonable discriminations between interstate rates and intrastate rates, or between those engaged in interstate commerce and those engaged in intrastate commerce. The logic of the company's argument would place under the control of Congress all such matters in which the plenary power of the Nation to protect the freedom of and to regulate commerce, and the attempted exercise by the State of its power to regulate intrastate commerce impinge or conflict. The company's argument in this connection is in entire accord with the doctrine repeatedly laid down by this court, that where the subject of commerce is national in its character and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated, it necessarily follows that that subject is to be free from all legislation whatever.

The cases in 118 U. S. 557, 565; 134 U. S. 418, 459; 193 U. S. 197, 350, cited in the opinion of the lower court (Tr. 108) do not in any wise alter the definition and principle which have been stated. What Justice Miller said in *Wabash, etc. Ry. Co.* v. *Illinois* 118 U. S. 557, 565, was simply that there is a commerce wholly within the State which is not subject to the constitutional provision, and that we may freely grant. Justice Miller did not say that the commerce so referred to is synonymous with intrastate commerce as that term is generally understood. On the contrary Justice Miller said (at p. 565) that it is not always easy where the lines of the different classes approach each other to distinguish between the one and the other. The commerce to which Mr. Justice Miller referred to in *Chicago etc. Railway Co.* v. *Minnesota*, 134 U. S. 418-459, was "the business of

common carriers limited to points within a single State." This class does not embrace the intrastate traffic of the State which is not limited to points within that State, but which extends to and affects points in other States. The language of Mr. Justice Harlan in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 350, referred to by the lower court, establishes the exact contrary of the position which it is cited to maintain. Mr. Justice Harlan there said:

> Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not permitted by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations or any combination of its citizens with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress.

The reference made by the lower court to the Employers Liability cases, 207 U. S. 463, is merely in reiteration of the principles announced in *Gibbons* v. *Ogden*, which we have discussed, and which, as we have shown, do not in any way conflict with our proposition, but, in fact, support it and assist in its demonstration.

We submit that the lower court errs in stating (Tr. 108-109) the *ratio decidendi* of *Louisville & Nashville Railroad Company* v. *Eubank*, 184, U. S. 27. The action of the Commission in that case did not fail because it attempted to employ an interstate rate as a standard for determining whether a local rate between points within Kentucky, over the same road as that over which the interstate rate prevailed was a violation of the State's long and short haul statute.

The statement of Mr. Justice Peckham, with reference to an enactment by Congress, that an interstate rate should be the sum of local rates prescribed by the several States, which is cited by the lower court (Tr. 109), relates only to the contention raised in the argument that such action would amount to an interference with the power of the State over local rates. It does not in any way relate to, and the learned Justice who delivered the opinion did not consider, the question of interference with interstate rates by the State's action. In that same case (at page 36), Mr. Justice Peckham said:

> We fully recognize the rule that the effect of a State constitutional provision, or of any State legislation, upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident.

And that statement of Mr. Justice Peckham was not mere dictum, as was the statement referred to in the opinion of the lower court, but was the very heart of the opinion and announced the doctrine upon which the case was decided. Mr. Justice Peckham further said (at page 41):

> The fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

In the Eubank case the carrier had the option of reducing its intrastate rate or increasing its interstate rate, and the effect of the State regulation upon the interstate rate was one merely of commercial compulsion, and yet the State regulation was declared unconstitutional. And the same learned Justice, whose opinion in the Eubank case we have been discussing, said in *Ex parte Young*, 209 U. S., 123-145:

> Still another Federal question is urged growing out of the assertion that the laws are by their necessary effect an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.

The case of *Missouri Pacific Railway Company* vs. *Kansas*, cited by the lower court (Tr. 110) is easily to be distinguished from the present case. In the former case, there was clearly no reason why terminal facilities should not have been established within the State of Kansas at the State line, and there was no reason why the State of Kansas should not require the railway company to perform its duty as an intrastate common carrier. It is not conceivable how the establishment of a station at the State line and the operation of an intrastate train would necessarily have interfered with interstate commerce. This Court has repeatedly held, however, that where sufficient facilities are furnished for intrastate traffic the States cannot require the stopping of interstate trains, and in the recent case of *St. Louis Southwestern Railway Company* v. *State of Arkansas*, 217 U. S., 136, this Court held that interstate commerce was unconstitutionally regulated by a statute of the State of Arkansas making it the carrier's duty to supply cars to shippers on demand, the conflict arising not in connection with any direct act of Congress but merely in connection with a rule of the car-

riers themselves, adopted in connection with the interchange of cars throughout the United States.

In that case this Court again observed the rule that, whenever the subject affected by a State laws is in its nature national, or requires one uniform rule or plan of regulation, Congress alone can regulate, and the inaction of Congress is evidence to the Court of its intention that commerce in this respect shall be free and untrammeled.

The Facts Established Show an Interference with and Burden upon and a Regulation of Interstate Commerce which is Prohibited by Settled Principles of Law.

As was said by Judge Sanborn in the case of *Shepard* v. *Northern Pacific Railway Company*, *supra*, (at page 769):

> The principles and rules of law, by which these orders and acts must be tried, have been conclusively established by the decisions of the Supreme Court.

It is respectfully submitted that the following doctrine has been established:

The power to regulate commerce "among" the States is granted by the Constitution to the Congress of the Nation. The United States, in the exercise of that power to its utmost extent, may use all means requisite to its complete exercise, and no State by virtue of any power it possesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant or the plenary exercise of this power, for these are paramount to all the powers of the State and inhere in the supreme law of the land. To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce, the Nation by its Congress and its courts may affect and regulate intrastate com-

merce, but no farther. To the extent that it does not substantially burden or regulate interstate commerce, or conflict with a law of Congress within its powers, a State may regulate the intrastate commerce within its borders, but no farther. If the plenary power of the Nation to protect the freedom of and to regulate commerce "among" the States, and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter give way, because the Constitution and the Acts of Congress passed in pursuance thereof are the supreme law of the land, "and that which is not supreme must yield to that which is supreme". And such laws of the State or orders of its Commission relating to intrastate commerce, which, by their necessary or natural or probable operation, have the effect substantially to burden interstate commerce, are beyond its powers, violative of the commerce clause of the Constitution, and void. The question as to whether or not the statutes and orders of State Legislatures and Commissions substantially burden interstate commerce may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The true answer to the question, and the test of the validity of the orders and statutes, is to be found in their *effect* upon commerce "among" the States, which is under the exclusive jurisdiction of the Congress. Congress has the exclusive power to regulate commerce "among" the States, and if the relation of the means to the end is shown to exist, and if the use of the particular means is not prohibited by the Constitution, the question of the degree of its appropriateness, of its greater or less adaptation, and of its relative or absolute necessity, is purely political, and the determination of Congress with regard thereto is binding upon the courts. "Let the end be

legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." When the commerce sought to be affected is completely internal and does not extend to or affect other States, and when the subject from its local nature does not seem to require a uniform rule of regulation, the State may regulate; but where the subject is national in its character and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated it necessarily follows that that subject is to be free from all legislation whatever.

When Congress has not legislated upon the subject, the Federal Courts will enforce the national power over commerce "among" the States in accordance with that common law enforced generally throughout the United States and operating upon all commercial transactions.

The principles and rules by which the order of the State Railroad Commission, herein complained of, must be tried, having been so settled, it is submitted that, upon the facts as established, this case is brought within the rule, and the orders of the State Commission are shown to be violative of the Constitution of the United States.

The one object overriding all others in the adoption of the Constitution of the United States was to keep the commercial intercourse among the States free from all invidious and partial restraints, and to prevent discriminations by one State against the commerce of other States; and the letter and spirit of the laws enacted under the Constitution require equality of rights to all shippers.

Any state act which directly and unavoidably reduces the revenue of interstate carriers on interstate traffic, or which directly or unavoidably diverts traffic

from interstate to intrastate channels, necessarily amounts to a regulation of and interference with interstate commerce.

The State regulation complained of would directly and unavoidably reduce appellant's interstate revenues, because interstate shippers and passengers will reship and rebuy tickets within the State in order to cut the interstate rates by a combination of intermediate interstate rates and reduced intrastate rates prescribed by the State; the spirit and letter of the Act to Regulate Commerce prohibit interstate rates in excess of combination of intermediate rates; and for these reasons the State regulation complained of necessarily amounts to, interferes with, and regulates interstate commerce.

The entire proposition may be briefly and simply expressed in syllogistic form as follows:

1. If the Order of the Railroad Commission of Kentucky complained of herein, as reasonably interpreted, if put into effect, either directly or by its necessary operation would interfere with, burden, or amount to a regulation of interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted.

2. The State Order, as reasonably interpreted, if put into effect, would by its necessary operation interfere with, burden, and amount to a regulation of interstate commerce, because:

(a) It would directly and unavoidably and with compelling force interfere with and reduce appellant's interstate revenues and interstate rates, and would reduce or destroy appellant's interstate traffic.

(b) It would destroy commercial relationship for many years existing between points in the State of Kentucky and points outside of the State and would create unjust discriminations in favor of the citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

(c) It would, where any election exists, directly and unavoidably and with irresistible force compel appellant either to reduce its interstate rates and inter-

state revenues or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other states.

3. Therefore, the Order of the Kentucky Railroad Commission, herein complained of, must be adjudged to be an interference with and an attempted regulation of interstate commerce, invalid, unconstitutional and void.

Upon the grounds urged, supported by the authorities cited, it is respectfully submitted that the order appealed from should be reversed, with direction to the court below to grant appellant the interlocutory injunction prayed for.

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APPENDIX.

KENTUCKY STATUTES CONCERNING RAILROADS REFERRED TO IN THE FOREGOING BRIEF.

Section 816. *Extortion—what is.* If any railroad corporation shall charge, collect or receive more than a just and reasonable rate, toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion. (Held to be void in *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132.)

Sec. 817. *Discrimination—what is.* If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination. (See Con., Secs. 213-218.)

Sec. 818. *Preference or advantage forbidden—rules defining same—quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person

or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more carloads of freight shall be transported at the same time for different persons, and for each shipper a carload or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a carload of freight and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight. (Held to be void in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491-2.)

Sec. 819. *Penalty and damages for extortion—discrimination—preference—jurisdiction—duty of Commission—limitation.* Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned

or operated by the corporation alleged to be guilty as aforesaid, and the Franklin Circuit Court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporations shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued. (See Con., Secs. 213-218.) (Held to be void in *Louisville & Nashville R. R. Co.*, 99 Ky. 132.)

Sec. 820. *Long and short haul over same road—penalty—jurisdiction of courts—duty of Commission.* If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating, runs or carries on its business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Com-

mission to investigate the grounds of complaint, and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted. (See Con., Sec. 218.)

Sec. 821. *Three Commissioners—duties.* There is established a department in the State government to be known as the Railroad Commission, which shall be composed of three Commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. Each of said Commissioners is authorized to administer oaths, and two of them shall constitute a quorum.

Sec. 829. *Complaints against companies—award of Commission—proceedings upon.* The Commission shall hear and determine complaints under Sections 816, 817 and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the Commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of such controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in *ordinary* cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other *ordinary* cases. If a trial is demanded the case shall be tried, in all respects, as other *ordinary* cases in which the same amount is involved, except that *no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence;* the judgment and proceedings thereon shall be the same as in other *ordinary* cases.

Sec. 2290b. *Adopting 1903 edition.* That the edition of the Kentucky Statutes, compiled and edited by John D. Carroll, and issued in one thousand nine hun-

dred and three, be, and the same is hereby adopted, as the law of the State, and in all actions and proceedings, the laws therein contained, from Section 1 to Section 4879 inclusive, including amendatory or supplemental sections, may be cited and referred to as the law of the State by reference to any citation of said sections, and any of the chapters or sections therein may be amended or repealed by the General Assembly in the manner now provided by reference to and citation of the chapter and section without giving the date or title of the Act from which the chapter or section is taken: Provided, *That this Act shall not be construed to render valid any invalid chapter or section or part thereof embraced in said statutes,* or to amend, modify or repeal any law or part thereof now in force or effect and not included in said statutes.